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Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings (Symposium: Lady Liberty's Doorstep: Status and Implications of American Immigration Law).

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Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings

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I. INTRODUCTION

A. *Plenary Power Meets Plenary Power*

To become a United States citizen, a lawful permanent resident alien[1] must successfully demonstrate a knowledge of United States history and government.[2] A standard examination question is: "How many

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1. A lawful permanent resident alien is a person who may live and reside on a permanent basis within the United States subject to removal due to specific violations of the immigration laws. *See* Immigration and Nationality Act ("INA") § 101(a)(20). Lawful admission for permanent residence is ordinarily a prerequisite to qualifying for naturalization as a United States citizen. Although the Constitution does not use the term "alien," it is used in statutory language. Under the INA, an "alien" is any person not a citizen or national of the United States. *See* INA § 101(a)(3). At times in this Article, I will use the term "alien" to achieve precision in quotations of statutory and other legal material or legal clarity. I have adopted "noncitizen" as a less prejudicial term.

The term "alien" unfortunately raises many negative images. Many writers are beginning to question the use of the term "alien." For example, Gerald Neuman points out that using the term alien "calls attention to [the person's] 'otherness' and even associates them with nonhuman invaders from outer space." Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1428 (1995).

2. INA § 312(a)(2) states that no person shall be naturalized as a citizen of the United States who cannot demonstrate a knowledge and understanding of the fundamentals of history, and of the principles and form of government, of the United States. For a general discussion on the United States history and government knowledge requirements, see 4 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 95.03[4][c] (1997).

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branches are there in the federal government of the United States?"[3] The correct answer of course is three branches. However, where immigration enforcement is concerned, the more accurate answer might appear to be two branches—Legislative and Executive. Why no judicial branch? The evisceration of judicial power is due to important recent legislation that purports to eliminate, or at least radically curtail, judicial review of immigration proceedings.

The Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA")[4] eliminated judicial review of deportation and exclusion orders for noncitizens convicted of "aggravated felonies." This legislation also eliminated a traditional, frequently granted, waiver of deportability for long term lawful residents. Judicial review was further restricted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA").[5] IIRAIRA repealed a longstanding provision that authorized judicial review in the circuit court of appeals and guaranteed habeas corpus review upon detention. Although IIRAIRA created a streamlined form of review in the circuit court of appeals for some classes of noncitizens, it purports to bar disfavored groups and disfavored claims from review in *any* Article III court. In addition, IIRAIRA contains a multitude of individual statutory provisions that Congress independently designed to expedite, curtail, or eliminate whatever remains of judicial review. A more detailed description of the legislation is set forth in Part IV.

Two forms of congressional plenary power—power over the jurisdiction of the Federal courts and power over immigration—shaped this legislation. The doctrine of plenary power in immigration law, a well

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3. AUSTIN FRAGOMEN ET AL., IMMIGRATION PROCEDURES HANDBOOK 14-68, 14-69 (1997).

4. The Anti-terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) [hereinafter "AEDPA"]. AEDPA also created a new form of deportation proceeding for noncitizens accused of terrorist activity which involved Article III court adjudication but severely curtailed the due process rights of the noncitizen respondent. This article will not address those provisions which are aimed at removals of noncitizens accused of terrorism. *See* Michael Scaperlanda, *Are We That Far Gone? Due Process and Secret Deportation Proceedings*, 7 STAN. L. & POL'Y REV. 23 (1996) (describing the new terrorism deportation procedures).

5. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (a modified version of the conference report on H.R. 2202 was included as Division C of the conference report filed in the House on H.R. 3601 (Omnibus Consolidated Appropriations Act (1997)) (H.R. REP. NO. 104-863), and by a recorded vote of 370-37 (with 1 abstaining), the House agreed to that conference report. On September 28, 1996, the Senate, by voice vote, agreed to the conference report on H.R. 3610, and the measure was signed by the President, Pub. L. No. 104-208, 110 Stat. 3009 (1996), *amended by*, 104 Pub. L. No. 302 (Oct. 4, 1996)) [hereinafter "IIRAIRA"]. The October 4 changes were part of a technical amendment bill.

known and frequently criticized legal construct,[6] holds that Congress has plenary power to regulate the admission of aliens to the United States with few constitutional limits.[7] The power to determine the substantive grounds for deportation (now called removal) have also been referred to as within the scope of this power.[8] Yet, even as the courts recite the mantra of plenary power, they have preserved due process rights for noncitizens and have carefully evaluated the statutory authority for the challenged governmental action.[9] Perhaps because of

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6. The plenary power of Congress and the Executive in immigration matters may more accurately be described as a doctrine that describes the extremely deferential standard that courts will apply in considering the constitutionality of government conduct in this area. Some influential articles on the scope of the plenary power include: Louis H. Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987), Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; and Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984). In recent decades, the majority scholarly view has been that the plenary power doctrine in immigration law would erode and would eventually be abandoned as courts allowed noncitizens to assert substantive constitutional rights. The development of the plenary power doctrine and its place in U.S. constitutional law is discussed and analyzed in STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY—LAW AND POLITICS IN BRITAIN AND AMERICA 177-222 (1987). *See also* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION, IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW ch. 7 (1996). Recently Professor Legomsky has been less optimistic about the speed at which the plenary power doctrine will erode. *See* Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995).

7. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889); Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (federal government has inherent power to exclusively regulate the admission of noncitizens). *See also* Fiallo v. Bell, 430 U.S. 787 (1977) (upholding statutory discrimination against the ability of illegitimate U.S. citizen children to sponsor their fathers for immigration as within the plenary power of Congress to control immigration admissions). It is not as clear that the same judicial deference should be given to review of actions taken by the executive to enforce the immigration statutes as the deference afforded to review of congressional legislation. See the discussion of executive as distinguished from congressional plenary power in Margaret H. Taylor, *Detained Alien Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1146 n.301 (1995).

8. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (upholding the deportation of three long term permanent residents based on their membership in the Communist party although the ground of deportation would be applied retroactively). *See also* Fong Yu Ting v. United States, 149 U.S. 698 (1893) (upholding congressional power to deport not just exclude under the Chinese Exclusion Acts).

9. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21 (1982) (returning lawful permanent resident is entitled to due process in exclusion procedures); Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86 (1903) (deportation procedures must comport with procedural due process). Hiroshi Motomura has thoroughly documented the use of statutory construction and procedural due process as substitutes for traditional constitutional analysis. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) [hereinafter "Motomura, *Procedural Sur-*

these judicial protections, Congress has again resorted to statutory limits on judicial review in an attempt to shield immigration actions from judicial interference.[10]

The power of Congress to define the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court has also been described as plenary.[11] Scholars concerned with the constitutional limits on this plenary power over jurisdiction have frequently written about ways in which congressional power might be limited or restrained.[12] Some have argued that the structure of our tripartite government and the doctrine of the separation of powers mandates federal court jurisdiction at least for federal and constitutional questions.[13] Others have argued that the constitutional guarantee of due process of law requires the right to challenge governmental conduct via some judicial process.[14] A few have even found limitations on congressional

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rogates"]; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) [hereinafter "Motomura, *Phantom Constitutional Norms*"].

10. See the discussion of the motivations of Congress in creating the limits on judicial review in Part III. In the past, Congress has also granted detailed procedural rights to noncitizens facing removal, perhaps in recognition of the important interests at stake in deportation. Other Congressional protections may have been motivated by reports of frequent agency errors. *See, e.g.*, former INA § 242 (detailing the notice required in deportation hearings).

11. Section 1 of Article III of the United States Constitution provides in relevant part that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This section also contains the "Exceptions Clause" providing that the "supreme [sic] Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." The assertion that congressional power over jurisdiction is plenary is in large part based on this power to create "exceptions" to jurisdiction. *See* PAUL BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 362-473 (3d ed. 1988) [hereinafter "HART & WECHSLER"]. *See also Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869) (holding that Congress had the power to create exceptions to the appellate jurisdiction of the Supreme Court to hear habeas corpus petitions); *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding that the first judiciary act improperly gave original jurisdiction to the Supreme Court to hear writs of mandamus).

12. A large number of articles have been written on the scope of congressional power to control federal court jurisdiction. For example, articles representing a wide array of views are gathered in two symposium issues. *See* Colloquy, 138 U. PA. L. REV. 1499 (1990); Symposium, *Congressional Limits on Federal Court Jurisdiction*, 27 VILL. L. REV. 893 (1982). Other articles are cited *infra*.

13. *See, e.g.*, Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929 (1982) (relying on the essential function of the federal courts to ensure conflict resolution between state and federal governments, uniform application of law and to protect individual from unconstitutional conduct by the elected branches); Lawrence Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

14. *See* Paul Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27

power in the language of the Constitution itself.[15] Still, others have made arguments based on the intent of the framers of the Constitution to limit the power of the elected branches.[16] These debates helped to defeat various bills that would have eliminated the jurisdiction of the federal courts in areas of particular controversy such as abortion, busing, prayer in public schools and other areas concerning civil rights.[17] Unfortunately, scholarly attention to the intersection of the congressional power over immigration and the congressional power to eliminate federal court jurisdiction has not been as intense.[18]

VILL. L. REV. 1030, 1034-35 (1982) (limits such as due process and equal protection which are external to Article III can restrain congressional plenary power over jurisdiction). Most of these scholars have written in a context in which they assume that state courts are available as an alternative to the federal courts. Immigration cases have been reserved to the federal courts by exclusive jurisdiction statutes. *See, e.g.*, former INA §§ 106, 279. State regulation of immigration has been limited by federal preemption and judicial doctrines concerning exclusive federal power to regulate immigration and foreign affairs. *See, e.g.*, Truax v. Raich, 239 U.S. 33 (1915) (finding federal immigration law preempted state regulation of employment by noncitizens); Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (exclusive federal authority to regulate admission of noncitizens); The Head Money Cases, 112 U.S. 560 (1884) (upholding federal taxation of noncitizen entrants to the U.S.); Chy Lung v. Freeman, 92 U.S. 275 (1875) (invalidating a California statute authorizing state officials to exclude disabled or debauched noncitizens as unconstitutional interference with the conduct of foreign affairs). As will be discussed in Part IV, a subsection of the new immigration statute provides for Exclusive Jurisdiction in the Federal Courts and then goes on to state that "[except as provided in this section and] notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien . . ." INA § 242(g).

15. This position was first articulated by Justice Story, in dicta, in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328-31 (1816). Justice Story read the language of Article III to require some forms of mandatory vesting of jurisdiction. *See* Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) (arguing that Congress must vest some types of jurisdiction in the federal courts such as federal question, suits affecting ambassadors, and cases concerning admiralty). Professor Amar's arguments were further developed in Akhil R. Amar, *Article III and the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990), *critiqued in* Martin H. Redish, *Text Structure and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633 (1990), *further elaborated in* Akhil R. Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651 (1990).

16. *See* Robert Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984) (finding evidence in historical sources outside the text of the Constitution that the framers intended some forms of mandatory federal jurisdiction to protect federal supremacy).

17. Some of these bills are discussed in Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, The Courts, and Congress*, 27 VILL. L. REV. 988 (1982). A fuller, historical perspective is presented in Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984). *See also* HART & WECHSLER, *supra* note 11, at 362-79. The legislative history of restrictive immigration bills is discussed *infra* Part II and Part V.

18. Ironically, many scholars were inspired to enter into the study of federal court jurisdic-

The 1996 immigration legislation appeared to move the issue of the scope of these so called "plenary powers" from the realm of academic debate to biting reality for many noncitizens. Although the question of whether Congress can remove all judicial review of immigration matters is intriguing, I contend that Congress has not yet reached this point. By removing express grants of federal court jurisdiction, Congress has revived the default vehicle for judicial review, the writ of habeas corpus.[19] I further contend that in reviving habeas corpus, Congress has defeated some of its own goals of streamlining judicial review and may have forced the "constitutionalization" of judicial review in immigration cases. Because habeas corpus jurisdiction remains, I will not explore the questions of whether Congress has the power to insulate immigration decisions from any review by an Article III court, or whether due process mandates Article III judicial review.[20]

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tion by the questions posed in the famous 1953 law review article written by Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). A significant portion of Professor Hart's discussion concerns the Supreme Court's confusion about judicial review in immigration proceedings. *See id.* at 1387-1402. Hart specifically commented in his article that the immigration cases were "one of the most impressive examples of the general point . . . and currently provides a testing crucible of basic principle." *Id.* at 1389. A notable exception is Richard Fallon. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies and Article III*, 101 HARV. L. REV. 915, 967-70 (1988) (arguing that, at a minimum, Article III values require appellate judicial review legislative courts and administrative agencies, including the area of immigration).

I suspect that this lack of attention from the scholarly world will soon end because the recent immigration legislation presents a fertile field for the exploration and mapping of the precise scope of congressional power to eliminate federal court jurisdiction. Even more important than the scholarly response and analysis will be the federal judiciary's reactions and analysis. The current and future federal court rulings on the constitutionality of these immigration provisions will tell us much about the judiciary's self-perceived ability and desire to preserve judicial review. As of June 1997, several cases discussing the power of Congress to eliminate the court of appeals' jurisdiction have rejected separation of powers and due process arguments and reaffirmed the right of Congress to eliminate lower court jurisdiction. *See, e.g.*, Yang v. INS, 109 F.3d 1185 (7th Cir. 1997) (neither Article III nor due process requires judicial review of discretionary agency decisions); Boston-Bollers v. INS, 106 F.3d 352 (11th Cir. 1997) (holding that AEDPA § 440(a)(10) not only does not violate Article III, it is illustrative of the concept of separation of powers envisioned in the Constitution); Williams v. INS, 114 F.3d 82 (5th Cir. 1997) (holding that the application of AEDPA to preclude judicial review did not violate separation of powers doctrine or due process clause).

19. I will refer to both the constitutional Great Writ and the embodiment of that right in 28 U.S.C. § 2241. In Part V of this Article, I will attempt to distinguish between the constitutional and statutory writs of habeas corpus.

20. The separation of powers or Article III argument in support of judicial review is based on the premise that judicial review is an inherent part of the balance of power between the branches of our government and that this separation is mandated by the structure or functional limits in the Constitution. *See* the articles discussed *supra* note 13. The due process argument

B. *Everything Old is New Again*

Before a person can be removed from the United States, the government must have control over the body of the person. In immigration cases, this simple fact has always been the basis for habeas corpus jurisdiction. As I will discuss further, the right to habeas review leads me to the conclusion that Congress, in its efforts to "streamline" the removal of noncitizens from the United States, has not created a more efficient structure. In fact, it has inadvertently returned to an historical model of judicial review in immigration proceedings that was inefficient in its form and often ineffective in expediting the removal of noncitizens. Congress has taken us back to the future or, to describe the new legislation more precisely, Congress has taken us forward to the past.[21]

This Article will focus on a key question raised by the re-emergence of habeas corpus review.[22] Which types of legal issues can be

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asserts that judicial process or at least judicial review of administrative process is required by the due process clause. *See* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993) (evaluating due process as a theoretical basis for preserving judicial review). Although it is possible that the courts might narrow the scope of habeas corpus review to an empty shell that might not comport with requirements of due process or perhaps violate the separation of powers doctrine, this article does not explore due process or Article III theoretical constraints on congressional power to limit federal court jurisdiction. In most of the few cases decided to date, the arguments concerning separation of powers and due process have not been thoroughly explored because of the theoretical availability of habeas corpus review. *See infra* Part V (discussing these cases). In one case, Judge Easterbrook of the Seventh Circuit found that habeas review was not available for the claims before him and further ruled that elimination of judicial review violated neither separation of powers restraints nor due process limitations. *See Yang*, 109 F.3d 1185.

21. "Back to the Future" is the title of a popular film in which an inventor created a time travel machine designed to take him to the future. Through misadventure and inadvertence, the machine travels backwards in time and the traveler must struggle to get back to his own time. *See* BACK TO THE FUTURE (MCA Universal 1985).

22. IIRAIRA also sought to curtail or restrict other forms of immigration litigation. Some of these restraints are discussed in Part IV. This Article focuses on the provisions aimed at eliminating judicial review of final orders of removal. I do not address all of the provisions in the legislation which might generally impact on litigation outside of the context of judicial review of a final order of removal. Additionally, I do not address the transitional provisions or retroactivity in general. For an analysis of the transitional provisions, see Lucas Guttentag, *The 1996 Immigration Act: Federal Court Jurisdiction—Statutory Restrictions and Constitutional Rights*, 74 INTERPRETER RELEASES 245-60 (Feb. 10, 1997). *See also* Mojica v. Reno, Nos. CV 97-1085, CV 97-1869, 1997 U.S. Dist. LEXIS 8959 (E.D.N.Y. June 24, 1997) (applying transitional jurisdictional provisions and refusing to apply AEDPA bar on relief from deportation retroactively). I also do not address the power of Congress to insulate decisions made outside the United States by consular officers in immigration related cases. For a discussion of

heard in habeas corpus petitions? In the litigation concerning the new legislation, the United States government is arguing that AEDPA and IIRAIRA have effectively repealed the general statutory authority for habeas corpus review, limiting noncitizens to constitutional habeas. Alternatively, the government contends that habeas corpus under 28 U.S.C. § 2241 is limited to "substantial" constitutional questions.[23] Many noncitizens will raise constitutional challenges in large part to bolster their assertion of subject matter jurisdiction under habeas corpus. Congress has inadvertently encouraged attacks on congressional and executive plenary power to control immigration. To the degree that these constitutional challenges succeed, the unanticipated result of habeas corpus review may be to hasten the long awaited mainstreaming of immigration law into modern constitutional law.[24] By channeling the battles into habeas corpus territory, Congress has entered a murky ground and raised the stakes to constitutional proportions.

While judicial recognition of substantive constitutional rights in immigration law will have many benefits, limiting judicial review to *exclusively* constitutional claims creates significant problems. Constitutionalization will make it even harder for unrepresented people to challenge immigration decisions and many people will be harmed if lower courts reject substantive claims based on plenary power precedents. It will distort the usual incremental changes in law produced by a dialogue among the branches of government. Judicial reliance on procedural due process surrogates for substantive rights will undoubtedly expand.[25] This, in turn, increases the cost of administering the immigration laws and increases congressional reluctance to create any new substantive immigration rights. Constitutionalization may also increase

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nonreviewability of overseas decisions, see LEGOMSKY, *supra* note 6, at 144-51, and STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 348-57 (2d ed. 1997). *See also* James R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1 (1991) (critiquing the plenary power doctrine as an illogical bar to judicial review of consular decisions).

23. *See, e.g.*, Kolster v. INS, 101 F.3d 785 (1st Cir. 1996) (government argued that statutory habeas corpus had been repealed by AEDPA, and constitutional habeas is all that is available); *Mojica*, 1997 U.S. Dist. LEXIS 8959 (government asserted that statutory habeas was repealed and constitutional habeas limited to substantial constitutional claims); Yesil v. Reno, 985 F. Supp. 828 (S.D.N.Y 1997) (same). The scope of both constitutional and statutory habeas are discussed below in Part V. I will argue that under the new laws, habeas corpus review is not limited to constitutional issues.

24. *See* Schuck, *supra* note 6 (suggesting that the demise of the plenary power doctrine will lead to the "mainstreaming" of constitutional immigration law).

25. *See* Motomura, *Procedural Surrogates*, *supra* note 9. In this article, Professor Motomura identified many of the problems created by judicial reliance on due process surrogates. *See id.* at 1699-1704.

unpredictability in immigration enforcement. I will discuss these implications and other unintended consequences of the Congressional attack on judicial review in Parts V and VI.

II. HISTORY REPEATS: PATTERNS OF JUDICIAL REVIEW

A. *Restrictions in Immigration Cases*

In some ways, the history of judicial review in immigration cases looks like an example of Newton's Third Law of Motion, that for every action there is an equal, and opposite, reaction.[26] As noncitizens challenged governmental decisions via writs of habeas corpus in federal courts and succeeded in overturning exclusion or deportation orders, Congress amended the immigration laws in an attempt to control the power of judicial review.[27] The following history will begin with a focus on habeas corpus review of early immigration cases. It will also illustrate how habeas corpus review, in combination with other types of judicial review such as mandamus or declaratory judgment actions, led Congress to believe that judicial review unduly restrained immigration enforcement. The latter part of this section discusses other developments in judicial review that led up to the 1996 legislation. These latest changes are part of the continuing efforts of Congress to control the timing, scope, and nature of judicial review of immigration proceedings.[28]

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26. *See* SIR ISAAC NEWTON, PRINCIPIA MATHEMATICA (1987). I do not mean to suggest that all of the statutory changes are intended by Congress to counter the success of noncitizens in using judicial review to overturn the agency determinations. Some of the changes are based on erroneous perceptions of members of Congress. *See infra* note 158 (discussing the myth that judicial review created wholesale delay). This continuing interaction between Congress and the courts has also been aptly characterized as a "dialogue." *See* Note, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760, 761 (1962) (analyzing the 1961 judicial review amendments and discussing some of the historical developments of judicial review in immigration cases) [hereinafter "*Continuing Dialogue*"].

27. This pattern is also explored in LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995). This excellent history discusses the laws aimed at Chinese immigration from the period of 1882 to 1924. In the most recent legislative hearings, Senator Simpson described the limits on judicial review as an effective block to class action litigation. "We also got rid of layers of people who love to bring class actions and disrupt the normal course of INS work." 142 CONG. REC. S11,711 (Sept. 28, 1996).

28. For a general history of the immigration laws of the United States between 1875 and 1917, see 1 GORDON ET AL., *supra* note 2, at § 2.02[2]. A curtailed history appears in

The Chinese Exclusion Acts were among the first federal statutes expressly to limit the admission of new immigrants.[29] In this series of restrictive statutes adopted prior to 1892,[30] Congress sought to bar the admission of Chinese laborers. The first Exclusion Acts did not expressly provide for, nor did they expressly limit, judicial review of an executive official's admission decision. Some Chinese applicants immediately challenged adverse admission decisions by filing writs of habeas corpus in federal court.[31] In characterizing the habeas corpus petition

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LEGOMSKY, *supra* note 6. *See also* NEUMAN, *supra* note 6, at Pt. I; Motomura, *Procedural Surrogates*, *supra* note 9, at 1625 (detailed historical analysis of the development of procedural due process as a substitute for substantive judicial review). Some of the history of habeas corpus and judicial review is presented in Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 943-51 (1995).

29. The Alien and Sedition Acts, enacted in 1789, were the first statutes passed of this kind. After these acts, it was not until 1875 that Congress passed restrictive immigration legislation. Early Immigration Acts, such as the Immigration Act of 1819, 3 Stat. 488, were concerned with the welfare of the immigrants, imposing such regulations as the number of people who were allowed on ships coming to the United States. However, later immigration legislation, such as the Immigration Act of 1882, 22 Stat. 214, had sought to protect the states from the financial burden of indigent immigrants. In contrast to this goal, the motivating factor behind the Chinese Exclusion Act was the fear that the Chinese would be too successful and harm the white United States workforce. *See* SALYER, *supra* note 27, at 1-7. For an excellent discussion of early history of immigration controls, see Gerald L. Neuman, *The Lost Century of Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

30. In the Chinese Exclusion Act of 1882, Congress suspended the admission of new Chinese laborers for ten years but preserved the right of Chinese previously residing in the United States to return by presenting a certificate of identity which documented the prior residence. *See* Act of May 6, 1882, 22 Stat. 58. Many Chinese people who fulfilled their prior residence requirement, but had left the United States prior to the passage of the act, lacked these certificates. In these types of cases, the Secretary of the Treasury authorized the collectors to accept other evidence of prior residence in lieu of the certificates. The collector at the port of San Francisco refused to take other evidence, making it necessary for the courts in San Francisco to become involved. *See* SALYER, *supra* note 27, at 18.

31. Habeas corpus jurisdiction existed as a result of the fact that in order to execute an exclusion or deportation order, the government must take the noncitizen into its custody. In this period, the custody prerequisite was strictly construed. Noncitizens could only seek a writ of habeas corpus when they were actually in the custody of the executive branch of government or in the custody of a transportation company under color of federal law. The petitioners seeking review relied on the federal statute granting habeas corpus jurisdiction to the federal district courts. *See* 28 U.S.C. § 2241. This statutory grant of habeas corpus jurisdiction has existed since 1789 and provides for habeas corpus jurisdiction to prisoners "in custody under colour, or by colour of the authority of the United States." *See* Section 14 of the Judiciary Act of September 24, 1789, 1 Stat. 73 (1789) (codified as amended at 28 U.S.C. § 2241(c)(1)). In 1867, the statute was amended to include "custody in violation of the Constitution or laws or treaties of the United States." *See* Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (1867) (codified as amended at 28 U.S.C. § 2241(c)(3)). For a history of the writ of habeas corpus, see WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 12-

as a challenge to the "legality" of the executive detention, federal courts also examined the evidence supporting the exclusion decision.[32] In many cases, the federal court overruled the admission officer's decision and granted the applicant admission.[33] The federal courts also rejected the executive's statutory interpretations of various provisions of the Exclusion Acts. These cases expanded the classes of Chinese exempt from a special documentation requirement and broadened the forms of evidence that established membership in an exempt class.[34]

Each time the litigation strategy of the Chinese succeeded, Congress amended the exclusion acts to plug the holes.[35] In 1888, Congress expressly tried to insulate the admission decisions from judicial interfer-

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63 (1980) and JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE ch. 2 (1994) (discussing the history and use of habeas corpus). *See also* Student Articles, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1238 (1970) [hereinafter "*Developments in the Law—Federal Habeas Corpus*"]. *See* the discussion of habeas corpus after the 1996 legislation *infra* Part V.

32. *See, e.g., In re* Chin Ah On, 18 F. 506 (9th Cir. 1883) (finding that a customs certificate is not necessary evidence for Chinese laborers who had left the United States before the 1882 Act went into effect); *In re* Low Yam Chow, 13 F. 605 (9th Cir. 1882) (holding that Chinese merchants who lived outside of China on the passage of the 1882 Act could establish membership in the merchant class by parol evidence); *In re* Tung Yeong, 19 F. 184 (N.D. Cal. 1884) (holding that certain Chinese people could land in the United States without customhouse papers proving that they were merchants).

33. In San Francisco, petitioners were particularly successful. Lucy Salyer estimates that the federal district court in San Francisco reversed the collector of customs in 86% of the cases. *See* SALYER, *supra* note 27, at 28. *See also Yeong*, 19 F. at 185-91 (briefly discussing the three major types of claims that the courts were hearing at the time).

34. *See* SALYER, *supra* note 27, at 28. The court interpreted certain provisions of the Exclusion Act much more broadly than the customs officials.

35. Section 6 of the Exclusion Act required that a person coming to the United States who was part of the exempt class provide documentation from the Chinese government that they did, in fact, belong to that class. Many merchants arrived at the border of the United States without the documentation and, as a result, customs officials sought to exclude them. However, the courts ruled that other evidence could be taken to prove membership in the exempt group. According to the courts, "Section 6 documentation," was not essential, provided the person could establish her membership in the exempted class with other evidence. *See Chow*, 13 F. 605. In the Restrictions Act of 1884, 23 Stat. 115, Congress attempted to redefine certain provisions of the Chinese Exclusion Act in a narrower fashion than the manner in which the courts had been interpreting those provisions. The 1884 amendment expressly prohibited the taking of other evidence and strictly required that the Chinese national produce the required documentation. Despite this new explicit statutory restriction on the taking of additional evidence, the courts continued to reject customs officials findings in other areas. For example, Courts also affirmed the right to *jus solis* citizenship for Chinese children born in the United States, even though their parents could not have been allowed to be naturalized due to statutory racial discrimination. *See In re* Look Tin Sing, 21 F. 905 (1884). This interpretation of the Fourteenth Amendment citizenship by birth in the territory of the United States was upheld in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

ence by providing that only the Secretary of the Treasury could review the admission officer's decision[36] and "not otherwise."[37] Again, applicants for admission challenged the 1888 amendments. Several courts found that the finality provisions had never become law because Congress had made the particular provision conditional upon ratification of a treaty with China.[38] This treaty was never ratified.

The finality provisions were next incorporated into the Immigration Act of 1891,[39] which governed general immigration, not Chinese exclusion alone. One historian has suggested, though it is not clear from the debates in the legislature at the time, that the purpose of making the decisions final was to prevent other classes of immigrants from having the same success as the Chinese.[40]

In *Nishimura Ekiu v. United States*,[41] the Supreme Court considered whether the finality provisions would shield the admission decisions of the executive branch from judicial review. Nishimura Ekiu filed a writ of habeas corpus challenging her exclusion. She argued that, despite

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36. Congress originally assigned the responsibility for enforcing the immigration laws to a part of the Treasury Department. Admissions decisions were made by "collectors" who determined admissibility and collected the appropriate federal head tax. The 1891 legislation created the position of Superintendent of Immigration in the Treasury Department. In 1903, Congress transferred the administration of the immigration laws to the Department of Commerce and Labor. In 1913, the functions were vested in the Department of Labor. Finally, in 1940, Congress moved the duties to the Immigration and Naturalization Service as a part of the Department of Justice. *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY 101 n.2 (3d ed. 1995).

37. Act of Sept. 13, 1888, § 12, 25 Stat. 476 (1888). Congress also voided the prior certificates for reentry to the United States and banned the readmission of prior residents. It was the new, tightened procedure which led to the exclusion of Chae Chan Ping who had obtained the certificate of identity before he left for China in 1887. He was refused readmission because Congress had voided the certificates in 1888, while he was in transit to the United States. The 1888 Act also banned all admission of Chinese. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889) (upholding the 1888 Act as constitutional and within the power of Congress).

38. *See* Li Sing v. United States, 180 U.S. 486 (1901) (noting that section 12 of the amendment was not in force); United States v. Gee Lee, 50 F. 271 (9th Cir. 1892) (holding that section 12 of the amendment which made collectors' decisions final was not in force due to China's failure to ratify a treaty).

39. *See* Immigration Act of 1891, § 8, 26 Stat. 1084 (1891). This section provided that the decision of the inspection officer was final, except for administrative appeals to the superintendent of immigration, whose actions were in turn subject to review by the Secretary of the Treasury. Section 13 of this statute contained an express grant of jurisdiction to the federal courts. However, the Supreme Court interpreted section 13 as only conferring jurisdiction over criminal and civil sanctions under the 1891 Act. *See* Nishimura Ekiu v. United States, 142 U.S. 651, 664 (1892) (this case is discussed *infra* text accompanying notes 41-44).

40. *See* SALYER, *supra* note 27, at 27.

41. 142 U.S. 651 (1892).

the finality provision, a review of evidence was an inherent part of habeas review. The Supreme Court rejected this argument, holding that Congress had intended for the factual determinations to rest solely with the executive officers.[42] Further, the Court's opinion appeared to restrict habeas corpus review to a consideration of whether the executive official had proper "jurisdiction" over her detention.[43] Courts, however, continued to review legal rulings in exclusion cases, interpreting *Nishimura Ekiu* to insulate only factual determinations.[44]

Many Chinese sought to avoid the Chinese Exclusion Laws or other immigration laws by asserting a claim of United States citizenship. In *United States v. Ju Toy*,[45] the Supreme Court appeared to accept the ability of Congress to insulate the decision of the immigration inspector from review by the judiciary. Ju Toy claimed to be a United States citizen. The inspectors denied his entry. The court found that, even assuming that Ju Toy was a citizen[46] and was entitled to constitutional protections, due process did not necessarily require a judicial hearing.[47]

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42. *See id.* at 660.

43. *See id.* at 663. For a discussion of the concept of jurisdictional review in habeas corpus, see DUKER, *supra* note 31, at 225-48. *See also* Weisselberg, *supra* note 28, at 944 n.40.

44. *See* SAYLER, *supra* note 27, at 31. In 1892, Congress renewed the suspension of the admission of Chinese for the next ten years and for the first time provided for the deportation of Chinese. The deportation procedure required a judicial hearing and judicial finding of deportability. This was in contrast to the administrative process for admission determinations. The 1892 Chinese Exclusion Act also invalidated the prior identity certificates and required new certification of residence in the United States prior to May 5, 1892. To avoid deportation if the person lacked a new certificate, the Chinese applicant had to produce at least one "credible witness other than Chinese" to establish prior residence. *See* Fong Yue Ting v. United States, 149 U.S. 698 (1893); *see also* United States v. Williams, 83 F. 997, 999 (N.D. Cal. 1897) (noting that a white person must testify). The certificate was obtained from the Collector of Internal Revenue. The deportation procedure required a judicial hearing before the person could be removed for lacking the necessary certificate. The Act did not expressly give the courts jurisdiction to review customs officials admission decisions but courts did review these decisions in habeas corpus.

45. 198 U.S. 253 (1905). This particular case came as a challenge to the Immigration Act of Aug. 18, 1894, ch. 301, § 1, 28 Stat. 372 (1894), which made the factual decision of the immigration inspector conclusive on the federal court hearing a habeas petition.

46. The district court had found that Ju Toy presented evidence of citizenship. *See Ju Toy*, 198 U.S. at 264 (Brewer, J., dissenting).

47. *See id.* at 263. But even though the Supreme Court determined that the factual findings of the inspector would not be set aside, the Supreme Court stated that the federal courts continued to have jurisdiction to determine the legality of the final decision and to determine if the proceedings themselves met the requirements of the Constitution. Justice Holmes stressed that petitioner "does not allege or show in any other way unlawful action or abuse of discretion or powers by the immigration officers who excluded him." *Id.* at 265. Note, however, that the Supreme Court has afforded greater constitutional protection when dealing with cases of deportation, as opposed to the exclusion situation that arose in *Ju Toy*. In *Ng Fung Ho v.*

In the 1907[48] and 1917 Immigration Acts,[49] Congress continued the effort to limit judicial review by specifically providing that the decision of the admission inspector was a "final decision."[50] Nevertheless, while the courts were grappling with precise meaning of this phrase, they often allowed the person to attack the deportation or exclusion orders through habeas corpus. In these habeas petitions, the courts heard constitutional challenges to the immigration procedures[51] and constitutional challenges to the substantive provisions of the laws.[52] However, the courts did not limit themselves to constitutional challenges. They also heard non-constitutional claims[53] such as challenges to the interpretation of the statute,[54] or whether "some evidence" supported the finding.[55]

White, 259 U.S. 276 (1922), the Supreme Court held that a person in deportation proceedings who made claims of United States citizenship was entitled to a full factual determination as to his citizenship by the federal district court. *See id.* at 284. The opinion distinguished *Ju Toy* as applying solely to admission decisions. *See id.* at 282. The continuing validity of *Ju Toy* was further weakened in *Rusk v. Cort*, 369 U.S. 367 (1962) (allowing declaratory judgement action to assert claim of citizenship made outside of the United States). *Rusk*, the new legislation, and citizenship claims made at the port of entry, are discussed *infra* Part IV.B.3 and note 184.

48. Immigration Act of 1907, 34 Stat. 898.

49. Immigration Act of 1917, 39 Stat. 874. This act and the 1907 act, *see supra* note 48, regulated all immigration, not just the migration of the Chinese.

50. *See* Section 25 of the 1907 Act. Prior to the 1907 and 1917 Acts, Congress used the same "finality" language in section 25 of the 1903 Act.

51. *See* Yamataya v. Fisher, 189 U.S. 86 (1903) (acknowledging the right to due process in deportation procedures but ultimately rejecting due process challenge to statutory scheme and deportation hearing procedures).

52. *See* Carlson v. Landon, 342 U.S. 524 (1952).

53. While I characterize these claims as "non-constitutional" claims, in fact these types of claims might also raise due process issues. As the conception of due process has evolved, the types of claims which might be raised in habeas corpus has also expanded. See the discussion *infra* Part VI concerning possible implications of due process challenges to the new legislation.

54. *See* Fong Haw Tan v. Phelan, 333 U.S. 6 (1948) (rejecting executive's interpretation of multiple criminal convictions deportation provision); Delgadillo v. Carmichael, 332 U.S. 388 (1947) (rejecting executive's interpretation of "entry"); Mahler v. Eby, 264 U.S. 32 (1924) (rejecting executive's interpretation of findings necessary for deportation after conviction under Espionage Act); Gegiow v. Uhl, 239 U.S. 3 (1915) (finding that the government misinterpreted the statutory ability to deny entry based on the job market in a particular area). *See also* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (rejecting executive's interpretation of procedural regulation); Wong Yang Sung v. McGrath, 339 U.S. 908 (1950) (rejecting executive's interpretation of APA procedural requirements).

55. While exercising habeas corpus jurisdiction, courts reviewed the administrative record to determine whether the administrative decision was supported by "some evidence." In several cases, this type of review resulted in a victory for the noncitizen. *See* Chin Yow v. United States, 208 U.S. 8 (1908) (finding that petitioner should be allowed to present evidence of his United States citizenship); *Ex Parte* Fierstein, 41 F.2d 53 (9th Cir. 1930) (finding "insufficient

During the attacks on suspected communists, anarchists and other subversives, and during periods of war, Congress enacted statutes designed to expedite the deportation of dangerous[56] and "enemy aliens."[57] Although the Supreme Court repeatedly rejected the litigants' attacks on the constitutionality of the substantive provisions, it entertained their challenges under habeas corpus jurisdiction. Some important cases of this period illustrate that even during the height of the expansion of congressional power over the regulation of immigration, habeas corpus review nevertheless continued. As one article noted, "aliens have often been left to the mercy of administrative authority in habeas proceedings, not because of limitation on the power of the writ, but because their substantive rights are limited."[58]

In *Bridges v. Wixon*,[59] the Supreme Court vacated a final order of deportation based on evidence finding that Harry Bridges belonged to an organization "affiliated with" the Communist Party.[60] Bridges' habeas petition challenged the competence of the evidence and asserted the bad faith of the government throughout his prosecution.[61] The Court

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evidence" to justify deportation); Maltez v. Nagle, 27 F.2d 835 (9th Cir. 1928) (finding no conclusive evidence to support deportation); *cf.* United States *ex rel.* Vajtauer v. Commissioner of Immigration, 273 U.S. 103 (1927) (finding there was some evidence to support deportation order and denying relief); United States *ex rel.* Tisi v. Tod, 264 U.S. 131 (1924) (finding some evidence to support the deportation order); Tang Tun v. Edsell, 223 U.S. 673 (1912) (finding there was evidence to support the inspector's findings). *See also* Gerald L. Neuman, *The Constitutional Requirement of Some Evidence*, 25 SAN DIEGO L. REV. 631 (1988).

56. *See* March 1903 Act, § 2, 32 Stat. 1214 (providing for the exclusion of anarchists). Many different statutes provided for the deportation of communists. *See, e.g.*, Section 22 of the Internal Security Act of 1950, 66 Stat. 205 (provisions related to communists' deportation), codified as § 241(a)(6)(c) of the 1952 INA.

57. *See, e.g.*, Ludecke v. Watkins, 335 U.S. 160 (1948). The petitioner was ordered deported by the Attorney General under a similar act, the Alien Enemy Act because of his affiliation with the Nazi party. *See* Act of July 6, 1798, 1 Stat. 577, R.S. § 4607, *amended by*, 40 Stat. 531. While the Court found that the special grant of Executive War Powers authorized the Act is elimination of judicial review, nevertheless, the Court heard the habeas corpus petition seeking release from detention and challenging the ability of the Executive to deport without a hearing. This case does not rely on congressional power over immigration. Since 1798, the President has, in the interests of the national security, had the discretionary power to deport nonçitizens of a foreign nation with whom the United States is engaged in a .declared war. The Enemy Alien Act is currently codified in 50 U.S.C. §§ 21-23.

58. *Developments in the Law—Federal Habeas Corpus*, *supra* note 31, at 1243 (footnote omitted).

59. 326 U.S. 135 (1945).

60. The Alien Registration Act of 1940, ch. 429, § 23, 54 Stat. 670, 671 (current version at 18 U.S.C. § 2385), created a ground of deportation for "membership or affiliation with any organization, association, society, or group, that believe in, advises, advocates, or teaches . . . the overthrow by force of violence of the Government of the United States."

61. Justice Murphy severely criticizes the government for the tactics and strategies used to

relied on a narrow statutory reading to find that Bridges was not deportable. Bridges also raised constitutional claims that the statute created an ex post facto punishment, but the Court's habeas jurisdiction does not rely on these constitutional claims.[62]

The constitutional issues which remained below the surface in *Bridges*, were directly resolved in *Harisiades v. Shaughnessy*.[63] Harisiades and two other permanent resident aliens filed habeas corpus petitions that challenged deportation based on past membership in the Communist Party.[64] They argued that their deportation denied them

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attempt to deport Bridges, a prominent union activist. *See Bridges*, 326 U.S. at 157 (Murphy, J., concurring). The government never succeeded in deporting Mr. Bridges. Mr. Bridges appeared at an immigration law conference in 1987 to retell the story of his deportation hearings. Suddenly from the back of the room, Maurice Roberts, an esteemed immigration scholar and former BIA chair, rose to explain his role in the case. He stated that at the time of the Supreme Court's decision, he was working as an attorney for the INS and, based on the opinion, he recommended that the Justice Department give up. Mr. Roberts said, "I recommended that the government close your file" and the two men shook hands. *See* Statement of Maurice Roberts at "Great Moments in Immigration History," 1987 Conference of the American Immigration Lawyer's Association, San Francisco, California (from author's notes taken at the Conference).

62. The Court would have had to overturn several precedential decisions to rely on the constitutional grounds directly. *See, e.g.*, Mahler v. Eby, 264 U.S. 32, 39 (1924); United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 154 (1923); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (deportation is not punishment but "simply a refusal . . . to harbor persons whom it does not want"). Hiroshi Motomura has discussed the subconstitutional decision in *Bridges* as an example of "phantom constitutional norms" reasoning. He suggests that the Court is clearly focusing on the consequences of deportation and the constitutional claim that deportation should be treated in the same manner as criminal punishment. *See* Motomura, *Phantom Constitutional Norms*, *supra* note 9, at 567-68.

63. 342 U.S. 580 (1952).

64. The Alien Registration Act of 1940, 64 Stat. 989, created a ground of deportation for membership or *past* membership in any organization which advocated the use of violence to overthrow the United States government. Congress had specifically amended the law to include past membership to overturn the Supreme Court decision the prior year in *Kessler v. Strecker*, 307 U.S. 22 (1939) (habeas corpus petition challenging statutory interpretation). The Court read the prior deportation ground as allowing only the deportation of current members of the Communist Party. Once membership ceased, the noncitizen was no longer deportable. Consequently, the Communist Party had expelled all noncitizen members. See the discussion of these statutes aimed at the deportation of subversives and Communists in ALEINIKOFF ET AL., *supra* note 36, at 513-18.

fundamental rights,[65] infringed First Amendment protections,[66] and violated the prohibition on ex post facto laws.[67] The Supreme Court rejected each of these substantive constitutional challenges.

In *Carlson v. Landon*,[68] a group of lawful permanent resident aliens also sought to prevent their deportation as members of the Communist party under the Internal Security Act of 1950.[69] The group filed individual writs of habeas corpus challenging the retroactive application of the 1950 changes, and alleging that their detention pending deportation was unconstitutional because it violated due process. The Supreme Court rejected the substantive constitutional challenge stating that "[s]o long . . . as aliens fail to obtain . . . citizenship by naturalization, they remain subject to the plenary power of Congress to expel them . . ."[70] Yet congressional plenary power over immigration did not suspend the power of the court to hear habeas petition.[71]

Noncitizens also used habeas corpus petitions to attack the executive's interpretation and application of the Internal Security Act. In *Galvan v. Press*,[72] the Supreme Court described Galvin's habeas petition as challenging the sufficiency of the evidence as well as the constitutional validity of the act as applied to a long term permanent resident. Galvin argued that the Court should construe the term "member" to include only those people who joined the Party "fully conscious of its advocacy of violence."[73] He contended that the evidence only showed that he had belonged to the Communist Party, but failed to establish

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65. The petitioners made a substantive due process argument that permanent resident aliens should have a "vested right" to remain or that they could not be deported on "unreasonable" grounds. *See Harisiades*, 342 U.S. at 584. *See* Siegfried Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 YALE L.J. 262 (1959); Siegfried Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Pre-1917 Cases*, 68 YALE L.J. 1578 (1959) (criticizing *Harisiades* as a form of unconstitutional banishment and questioning the courts reasoning).

66. *See Harisiades*, 342 U.S. at 591-92.

67. The Court characterized the application of the law as not being retroactive but found that even if it was, deportation was a civil sanction and therefore outside the constitutional prohibition on ex post facto criminal laws. *See id.* at 593-95. The ex post facto prohibition is found in U.S. CONST. art. I, § 10, cl. 1.

68. 342 U.S. 524 (1952).

69. *See* The Internal Security Act of 1950, 64 Stat. 987.

70. *Carlson*, 342 U.S. at 534.

71. In recent litigation, the government has asserted that *Carlson* stands for the proposition that no judicial review is guaranteed by the Constitution. *See, e.g.*, Duldulao v. INS, 90 F.3d 396, 399 (9th Cir. 1996).

72. 347 U.S. 522 (1954).

73. *Id.* at 525.

his personal awareness of the commitment of the Party to violence. He further argued that to construe the statute in any other manner would constitute a due process violation.

In the majority opinion, Justice Frankfurter carefully considered Galvin's construction of the term "member" in the statute and reviewed the evidence presented in the administrative hearing. He found the administrative officer was "entitled to conclude" that the evidence established Galvin's membership in the Party.[74] He also rejected Galvin's due process challenge, noting that although this construction may "shock the sense of fair play—which is the essence of due process,"[75] the Court was not "writing on a clean slate."[76]

During this time, the Supreme Court decided two important immigration cases.[77] In *United States ex rel. Knauff v. Shaughnessy*[78] and *Shaughnessy v. United States ex rel. Mezei*,[79] the Supreme Court upheld provisions of the 1941 Act[80] that allowed the executive to exclude individuals without a hearing on national security grounds during the national emergency proclaimed on May 27, 1941 (World War II).[81] Knauff, a noncitizen who married an American serving in the armed forces in Germany, and Mezei, a lawful permanent resident who sought reentry, were both excluded without an evidentiary hearing and without administrative or judicial review. The Supreme Court rejected the challenges made by Knauff and Mezei.[82] In a famous phrase, Justice Minton writing for the majority stated, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[83]

Knauff and *Mezei* established a new high watermark in the scope of

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74. Although the Court was not reviewing the facts under a "substantial evidence" standard, this opinion and others indicate that even in habeas corpus jurisdiction, the Court will evaluate the competence of the evidence. *See, e.g.*, Bridges v. Wixon, 326 U.S. 135 (1945) (discussed *supra* text accompanying notes 59-62).

75. *Galvan*, 347 U.S. at 530.

76. *Id.* at 530-31.

77. For an excellent discussion of the historical and legal context of both cases, see Weisselberg, *supra* note 28.

78. 338 U.S. 537 (1950).

79. 345 U.S. 206 (1953).

80. *See* Act of June 21, 1941, amending § 1 of the Act of May 22, 1918, 55 Stat. 252.

81. *See* Presidential Proclamation No. 2523, 55 Stat. 1696.

82. While the Court did hear the habeas petitions in both cases, the Court limited its review to whether the Attorney General could exclude without administrative or judicial hearings. *See Mezei*, 345 U.S. 206; *Knauff*, 338 U.S. 537.

83. *Knauff*, 338 U.S. at 544.

the plenary power doctrine at least as it applied to people seeking entry to the United States. They also led Professor Hart to criticize the Supreme Court in his famous article, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic.*[84] Hart questioned the Supreme Court's willingness to uphold a statute which allowed the executive to act without any administrative process, fact finding, or opportunity for the alien seeking admission to even know the grounds for his or her exclusion. He argued that, at a minimum, the Court could have used its power in habeas corpus to inquire into the facts alleged to support the exclusion.[85]

Passage of the Declaratory Judgment Act in 1934[86] and the Administrative Procedure Act in 1946[87] expanded judicial review of immigration proceedings. Both statutes, in combination with general federal question jurisdiction,[88] made it possible for noncitizens to challenge the actions of the government in immigration proceedings without the necessity of waiting for actual arrest or detention that were the necessary predicates to habeas corpus jurisdiction.[89] The government opposed these expansions of judicial review, and in the important case of *Heikkila v. Barber*,[90] the Supreme Court held that the finality provisions limited noncitizens to review in habeas corpus.

In *Heikkila*, the Court considered whether noncitizens could use the provisions of the Declaratory Judgment Act and the Administrative Procedure Act ("APA") to challenge actions taken under the 1917 Immigration Act as amended by the Internal Security Act of 1950.[91] Section 10 of the APA provides that a person suffering a wrong from

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84. Hart, *supra* note 18.

85. *See id.* at 1391-96.

86. 40 Stat. 955 (current version at 28 U.S.C.A. § 2201, *et seq*).

87. 60 Stat. 243 (current version at 5 U.S.C. § 551, *et seq.*).

88. *See* 28 U.S.C. § 1331. Neither the Declaratory Judgment Act nor the Administrative Procedure Act directly confer subject matter jurisdiction on a federal court. *See infra* note 213. Other statutes used in combination with these acts included the mandamus statute. *See* 28 U.S.C. § 1361.

89. *See* LEIBMAN & HERTZ, *supra* note 31, at § 8.2(d) n.42 (gathering cases analyzing custody in immigration cases as an element of habeas corpus jurisdiction). The modern interpretation of the custody requirement in habeas corpus is discussed *infra* Part V.

90. 345 U.S. 229 (1953).

91. *See id.* Three Courts of Appeals reached this issue: Judge Goodrich for the Third Circuit in *Trinler v. Carusi*, 166 F.2d 457 (3d Cir. 1948); Judge Bazelon for the D.C. Circuit in *Kristensen v. McGrath*, 179 F.2d 796 (D.C. Cir. 1949); and Judge McAllister for the Sixth Circuit in *Prince v. Commissioner*, 185 F.2d 578 (6th Cir. 1950). All held that a noncitizen for whom a deportation order is outstanding may challenge the validity of the order under the APA.

an agency action can seek judicial action, with the exception that it is not available if there is a "statute precluding judicial review."[92] Examining the finality language of the 1917 Act and the historical interpretation[93] of these types of provisions, the Court concluded that the finality provision precluded APA review.[94] The *Heikkila* opinion goes on to conclude that noncitizens are not foreclosed from all judicial review but must be afforded habeas corpus review as a constitutionally required minimum.[95]

Although *Heikkila* was decided after the passage of the 1952 Immigration and Nationality Act ("INA"), the opinion expressly stated that the Court was not considering the effect of the INA.[96] Two years after *Heikkila*, the Court heard an almost identical challenge in the case of *Shaughnessy v. Pedreiro*.[97] However, in *Pedreiro*, the Court found that the INA's provision making decisions of the Attorney General "final," although practically unchanged from the 1917 Act,[98] was not intended to preclude APA review or the use of declaratory judgment actions.[99]

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92. APA § 10 (codified at 5 U.S.C. § 703).

93. Note that the often cited historical review in *Heikkila* is somewhat incomplete in that it leaves out many of the very important immigration acts that shaped the history of judicial review of immigration proceedings. *See Heikkila*, 345 U.S. 229. Justice Clark limited his history to the 1891 and the 1917 Acts. *See id.* at 232-34. These Acts do not represent a complete history of judicial review in immigration proceedings.

94. *See id.* at 235.

95. *See id.* at 234-35.

96. *See id.* at 232 n.4.

97. 349 U.S. 48 (1955). Neither *Heikkila* nor *Pedreiro* are clear about the claims cognizable in habeas review. In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), Justice Clark, who also authored *Heikkila*, granted Accardi's habeas corpus petition which raised statutory and regulatory challenges to his deportation. The dissent criticizes this use of habeas corpus. *See id.* at 270-71. However, the dissent in *Pedreiro*, while arguing that habeas corpus is the only form of relief, cited the legislative history as saying that in a habeas petition the "court determines whether or not there has been a fair hearing, whether or not the law has been interpreted correctly, and whether or not there is substantial evidence to support the order of deportation." *Pedreiro*, 349 U.S. at 56. The confusion over the range of cognizable claims is discussed *infra* Part V.

98. The 1917 Act provided, relating to deportation: "In every case where any person is ordered deported from the United States under the provisions of this Act . . . the decision of the Attorney General shall be final." Section 19, 39 Stat. 874, 889 (1917), *amended by* 54 Stat. 1238 (1940) (current version at 8 U.S.C. § 1252). By contrast, the 1952 Act provided, relating to deportation: "In any case in which an alien is ordered deported from the United States under the provisions of this chapter . . . the decision of the Attorney General shall be final." 66 Stat. 210 (1952).

99. It is interesting to note that Justice Frankfurter dissented in *Heikkila*, with Justice Black joining, noting the intent of the legislature evidenced by the legislative history. *See Heikkila*, 345 U.S. at 237-41 (Frankfurter, J., dissenting). Justice Black's majority opinion in *Pedreiro* was essentially an expanded version of the Frankfurter dissent. *See Pedreiro*, 349 U.S. at 48.

The Court gave a three-part rationale for its decision. First, the purpose of the APA was to remove obstacles to judicial review in subsequently passed statutes, such as the INA. Next, the Court cited the legislative history of both the APA and the INA and concluded that Congress intended to allow for liberal judicial review. Finally, the Court looked to section 12 of the APA. Section 12 provides that "no subsequent legislation shall be held to supersede or modify the provisions of this act except to the extent that such legislation shall do so expressly." Since the INA did not expressly state the intention to supersede or modify the APA, it remained a viable avenue for review.[100]

These statutes, in combination with habeas corpus review as a last resort, led to many novel and creative challenges and, in some notorious cases, lengthy delay in the execution of deportation or exclusion orders.[101] In 1961, Congress adopted a new express provision for judicial review of deportation and exclusion orders that was designed to expedite review and avoid piecemeal litigation. Former INA § 106[102] established a basic grant of judicial review through petitions for review of final deportation orders to the circuit court of appeals and writs of habeas corpus for exclusion orders in the district courts.[103] In addition to the petition for review, section 106 preserved the writ of habeas corpus to challenge executive detention whenever the noncitizen was taken into custody.[104]

Although section 106 was created as the "sole and exclusive" form

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Also interesting is the fact that Justice Clark, who wrote the opinion in *Heikkila*, and Justice Douglas, who had joined in that opinion, changed sides and went with the majority in *Pedreiro*. The rest of the majority in *Heikkila* dissent in *Pedreiro*, with the exception of Chief Justice Vinson and Justice Jackson, both of whom had left the court.

100. In *Brownell v. Tom We Shung*, 352 U.S. 180 (1956), the Court expanded this holding to encompass exclusion orders as well. *Shung's* importance is that its language seemed to have the effect of expanding all remedies available in deportation cases to exclusion hearings.

101. The most famous case is that of Carlos Marcello. Mr. Marcello was first ordered deported by the agency in 1953. He was never successfully removed and died at age 83 in the United States. *See* L.A. TIMES, Mar. 5, 1993, at A3. *See also* ALEINIKOFF ET AL., *supra* note 36, at 904 (discussion of Mr. Marcello); Mark A. Mancini, *The Carlos Marcello Case*, *in* 2 IMMIGRATION AND NATIONALITY LAW 2 (1990). For a chronology of litigation in deportation proceedings against Mr. Marcello, see *United States ex rel. Marcello v. District Dir.*, 634 F.2d 964, 974 (5th Cir. 1981). Mr. Marcello was presented to Congress as an example which supported a more streamlined system of judicial review.

102. 8 U.S.C. § 1105a (repealed in IIRAIRA § 306(a)).

103. This statute was modeled on the Hobbs Act, codified in 28 U.S.C. §§ 2341-51.

104. *See* former INA § 106(a)(10). The INA also contained an express grant of habeas jurisdiction to test the validity of continued executive detention if the government had failed to remove the noncitizen within six months of the final order of deportation. *See* former INA § 242(b). This provision was repealed in IIRAIRA.

of judicial review of final orders of deportation under former INA § 242(b),[105] litigation soon arose about the type of actions, orders and decisions of the agency that were within the term "final order." In an important case, *Cheng Fan Kwok v. INS*,[106] the Supreme Court held that final orders did not include decisions collateral to the deportation order.[107] *Cheng Fan Kwok* resulted in other types of immigration litigation in which noncitizens challenged other decisions and actions of the INS. For example, noncitizens used this ruling to challenge denials of adjustment of status to lawful permanent resident[108] or the failure of the INS to approve or adjudicate an immigrant visa petition.[109] Professor David Martin noted that *Cheng Fan Kwok* seemed to indicate a willingness to expand judicial review, but also created new problems for the efficient enforcement of the immigration laws.[110]

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105. Former INA § 242(b) set forth the structure of the deportation proceedings.

106. 392 U.S. 206 (1968).

107. In *Cheng Fan Kwok*, the Court had to determine if a request to the district director for discretionary relief fell within a final order which would be reviewable by the court of appeals. The Court held that it was not, as it was collateral to a section 242(b) administrative hearing. *See id.* at 216. The Court distinguished discretionary relief from other types of relief, such as a stay of deportation or a denial of a motion to reopen, by noting that the latter two necessarily follow from a section 242(b) administrative hearing. *See id.* at 212. In a situation where the discretionary relief was sought from the district director, the administrative action is completely distinct from a section 242(b) proceeding, and therefore did not fall under the judicial review pattern prescribed by section 106. *See id.* at 212-13. In *INS v. Chadha*, 462 U.S. 919, 937-39 (1983), the Supreme Court created more confusion in this area. The opinion referred to "all matters on which the validity of the final order is *contingent* rather than only those determination actually made at a hearing." *Id.* at 937 (emphasis added). This language apparently broadened the scope of section 106 jurisdiction to allow Chadha to challenge the constitutionality of the one-house veto of the administrative grant of suspension of deportation. The confusion over the scope of section 106 final orders is discussed in ALEINIKOFF ET AL., *supra* note 36, at 919-21. *See also* Susan M. Akram, *Traps for the Unwary, or Major Issues on Judicial Review of Deportation Decisions Under INA § 106, in* 2 IMMIGRATION AND NATIONALITY LAW HANDBOOK 367 (1995). This article provides an excellent discussion of the types of claims found to be within and without the scope of section 106 jurisdiction. Although section 106 has been repealed, analogous arguments will undoubtedly be made to analyze the preclusive effects of the new section 242.

108. *See, e.g.*, Che-Li Shen v. INS, 749 F.2d 1469 (10th Cir. 1984); Shahla v. INS, 749 F.2d 561 (9th Cir. 1984); Ijoma v. INS, 854 F. Supp. 612 (D. Neb. 1993). *But cf.* Yeung v. Reno, 868 F. Supp. 53 (S.D.N.Y. 1994) (finding no jurisdiction to review denial of adjustment of status by district director).

109. *See, e.g.*, DeFigueroa v. INS, 501 F.2d 191 (7th Cir. 1974).

110. *See* David Martin, Mandel, Cheng Fan Kwok, *and Other Unappealing Cases: The Next Frontier of Immigration Reform*, 27 VA. J. INT'L L. 803 (1987). Martin advocates removing the provisions of former INA § 106 which vacated the federal court's jurisdiction if the noncitizen was removed (or voluntarily left) during the appeal. *See* former INA § 106(c). IIRAIRA has removed this provision and there is now no statutory obstacle to continuing a petition for review after the noncitizen's departure or removal. The court of appeals may also

Federal courts were also willing to consider cases that presented "pattern and practice" violations of the immigration laws or cases that challenged the legitimacy of INS procedures without requiring individual exhaustion of administrative review or the review provided in former INA § 106.[111] Courts did not limit noncitizens to the section 106 procedures when the issue to be presented in the case required the development of a factual record in federal district court. Without the district court proceeding, the noncitizen could not establish an adequate record in the administrative agency, and thus the court of appeals would not have a record to evaluate when hearing an individual petition for review.[112]

Together, these patterns of litigation led to increasing congressional and administration frustration. Congress made only minor changes in the 1961 scheme for judicial review, and few were contemplated until the early 1980s when Congress considered several statutes for reform of the immigration laws.[113] The Administrative Conference of the United

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issue a stay pending the adjudication of the appeal. *See* INA § 242(b)(3)9B). The same should be true in habeas cases. Once the habeas petition is filed, even removal does not vacate the court's jurisdiction. *See* discussion *infra* Part IV. Unfortunately, the statute does not include Professor Martin's recommendation that the elimination of the departure rule should also be accompanied by a requirement that the government must bear the expense of returning noncitizens who are successful on appeal: "[t]his guarantee not only reflects simple fairness. It would also provide an added incentive for the Justice Department to look carefully at every appealed case or motion to reopen, before actual deportation, to see whether the Department would consent to a stay of deportation." Martin, *supra*, at 819.

111. *See* Haitian Refugee Ctr. v. Smith, 676 F.2d 1023 (5th Cir. 1982) (class challenge to political asylum procedures). *See also* Haitian Refugee Ctr. v. Meese, 791 F.2d 1489 (11th Cir. 1986) (awarding attorneys' fees and reaffirms jurisdiction); *but cf.* Dhangu v. INS, 812 F.2d 455 (9th Cir. 1987); Gallanosa v. United States, 785 F.2d 116 (4th Cir. 1986); Bothyo v. INS, 783 F.2d 74 (7th Cir. 1986); Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985). These cases hold, generally, that the exhaustion requirement in INA § 106(c) cannot be waived. In IMMIGRATION PROCESS & POLICY, the casebook authors suggest that this exception to section 106 was used too frequently and in one case had completely "eviscerated INA § 106(a) by tolerating a truly audacious 'end run.'" ALEINIKOFF ET AL., *supra* note 36, at 940-41 n.20 (discussing Montes v. Thornburgh, 919 F.2d 531 (9th Cir. 1990)).

112. The purpose of requiring exhaustion of administrative remedies is to allow the agencies to develop their own records, and, possibly, correct their own errors. Exhaustion leads to a better record for judicial review. *See* Schlesinger v. Councilman, 420 U.S. 738 (1975); Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 35-36 (1975). David Martin has questioned this assumption when the administrative procedures do allow for the development of an adequate record. *See* David Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1313-14, 1325 (1990).

113. *See* Omnibus Immigration Control Act (including the Air and Expeditious Appeal, Asylum and Exclusion Act) of 1981, S. 1765 and H.R. 4832, 97th Cong., 1st Sess. (1981); Immigration Reform and Control Act of 1982, S. 2222 and H.R. 5872, 97th Cong., 2d Sess. (1982)

States ("ACUS") also commissioned several studies of these issues. In an article based on one of these studies, Stephen Legomsky described the prevailing attitudes:

> Recent congressional bills have taken aim at both administrative and judicial review structures in the field of immigration. Within the Department of Justice, there is talk of curtailing administrative review of certain controversial categories of decisions . . . . And the subject of judicial review has become a perennial battlefield in this corner of the law. Pressures are building, and something is certain to give soon.[114]

Professor Legomsky's detailed study suggested substantial revision in the administrative process and adjustments to the judicial review scheme under former INA § 106 and other INA provisions.[115] Paul Verkuil's study focused on the initial administrative hearings procedures

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(S. 2222 passed the Senate on August 12, 1982 by an 80-19 vote, but H.R. 5872, and later H.R. 6514, never came to vote in the House); Immigration Reform and Control Act of 1983, S. 529 and H.R. 1510 (1983) (S. 529 passed the Senate 76-18 on May 18, 1983, and H.R. 1510 passed the House 216-211 on June 20, 1984. A conference began on September 13, 1984, but no final agreement was reached and the legislation died when Congress adjourned on October 11, 1984). These bills contained provisions reforming and streamlining the administrative and judicial processes. Supporters of the proposed legislation sought to eliminate or at least restrict the "multi-tiered" judicial review process and the "procedural morass" which allegedly had enabled dilatory tactics in the exclusion and deportation processes. *See* Immigration Reform and Control Act of 1982; *Joint Hearings on H.R. 5872 and S. 2222: Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, and the Subcomm. of Immigration and Refugee Policy of the Senate Comm. on Judiciary*, 97th Cong., 1st Sess. (Oct. 14 and 16, 1981).

114. Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1300 (1986) [hereinafter "*Forum Choices*"] (footnotes omitted).

115. Professor Legomsky's administrative recommendations were adopted by the ACUS, 1 C.F.R. § 305.85-4. His judicial review recommendations were not included. For example, he called for more clarity in former INA § 279 which granted subject matter to district courts over "all causes, civil and criminal, arising under any of the provisions of [title II of the INA]." Some courts read section 279 as precluding general federal question jurisdiction and others read it as an express general grant of federal court jurisdiction in immigration cases. Yet, some courts read this section to allow additional review of exclusion or deportation orders that were intended to be covered in section 106. Although Professor Legomsky did not invite Congress to use section 279 as a preclusion statute, the new legislation recognized the varied judicial interpretations. More than ten years after his study, Congress amended the provision to allow only the government to assert federal court jurisdiction under its terms. I discuss section 279 in Part IV and in Lenni B. Benson, *The "New World" of Judicial Review of Removal Orders*, *in* 2 IMMIGRATION AND NATIONALITY LAW HANDBOOK 32 (1997). It is beyond the scope of this Article to discuss all of Professor Legomsky's thoughtful recommendations and observations.

and identified factors which would be constitutionally required.[116] He noted that providing more expansive administrative review should minimize the intrusiveness of judicial review.[117] Professor David Martin studied the adjudication of political asylum claims.[118] Many of his suggested administrative reforms were later adopted by the INS.[119]

During this same time period, Congress considered other major substantive changes to the immigration laws. The compromise legislation finally adopted created the Immigration Reform and Control Act of 1986 ("IRCA").[120] IRCA balanced the creation of employer sanctions against two legalization programs designed to legitimate some existing undocumented populations.[121]

Although limits on federal court jurisdiction and review were proposed during this time period,[122] rigorous opposition which questioned the constitutionality of the limitations[123] and the compromise limitation of review for people seeking legalization under the "amnesty" and "seasonal agricultural worker" programs forestalled any sweeping change of section 106.[124] The compromise limitation consisted of language which specifically limited federal court review of claims raised by legalization seekers. The statutes provided that "there shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section . . . there shall be judicial review of such a denial only in the judicial review of an order of exclusion or

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116. His study formed the basis of Paul Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141 (1984).

117. *See id.* at 1180.

118. Professor Martin's study is discussed in Martin, *supra* note 112, at 1325.

119. *See* Stephen H. Legomsky, *The New Techniques for Managing High-Volume Asylum Systems*, 81 IOWA L. REV. 671 (1996) (discussing the proposals, reforms, and state of asylum adjudication prior to the 1996 legislation).

120. Pub. L. No. 99-603, 100 Stat. 3359.

121. The first program, called "amnesty," allowed people who could establish continuous unlawful presence prior to January 1, 1982 to apply for permanent residency. *See* INA § 245A. The second program was adopted to legalize agricultural workers who may have only made a seasonal appearance in the United States. *See* INA § 210.

122. Congress was interested in limiting the availability of administrative and judicial review to correct what it perceived as an inefficient system. *See* William Smith, *Immigration Law Reform: Proposals in the 98th Congress*, 21 SAN DIEGO L. REV. 7 (1983).

123. *See* discussion and materials *infra* notes 294-95.

124. *See* S. REP. NO. 99-132, 99th Cong., 1st Sess., at 48 (Aug. 28, 1985) (reasons that to insure "reasonably prompt determinations" no judicial review is provided under the legalization program). *But cf.* H.R. REP. NO. 99-682, Pt. I, 99th Cong., 2d Sess., at 74 (July 16, 1986) (providing for limited administrative and judicial review of denials of applications for legalization). The final version of the law retains the latter approach. *See* IRCA §§ 210(e)(3), 245A(f).

deportation under section 106."[125]

The Supreme Court in *McNary v. Haitian Refugee Center*[126] found that this language did not preclude pattern and practice violations or allegations of unconstitutional implementation of the legalization programs.[127] The Court held that, despite the limit on review, the district court had jurisdiction to hear a class action challenging the procedures used in the seasonal agricultural worker ("SAW") program. In part, the Court's holding was based on the rationale that allowing the class action would expedite the adjudication of the SAW claims. Justice Stephens reasoned that limiting review to individual claims filed in the court of appeals, after the exhaustion of the administrative procedures, would have the effect of creating even longer delays.[128]

More than ten years after the creation of the legalization and seasonal agricultural worker programs, several large class action law suits were still raising challenges to the regulations and implementation of the program.[129] Thousands of noncitizens class members awaited adjudication of their claims.[130] In *Reno v. Catholic Social Services, Inc.*,[131] the Supreme Court reaffirmed its holding in *McNary* but rejected the lower court's certification order on ripeness grounds. The district court had certified a class including all people who would have qualified for

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125. INA §§ 210(e), 245A(f)(4). These sections authorized the creation of a single level of appellate review. The INS created the Legalization Appeals Unit. *See* 52 Fed. Reg. 16,190 (May 1, 1988). *See also* Francesco Isgro, *Administrative and Judicial Review of Denials of Temporary Resident Status*, 2 GEO. IMMIGR. L.J. 473, 477 (1988) (written by the associate general counsel of the INS, this article describes the legalization programs).

126. 498 U.S. 479 (1991).

127. *See* Haitian Refugee Ctr. v. Meese, 791 F.2d 1489 (11th Cir. 1986); Haitian Refugee Ctr. v. Smith, 676 F.2d 1023 (5th Cir. 1982).

128. The Court noted that waiting for individual deportation orders to be entered and reviewed would create long delays, delays that Congress had intended to eliminate when they passed the petition for review provision. *See McNary*, 498 U.S. at 490. The scope of the pattern and practice exception has been refined in subsequent cases; however, declaratory and injunctive relief are still viable remedies, though recently limited by IIRAIRA. *See* Robert Pauw, *Judicial Review of "Pattern and Practice" Cases: What to Do When the INS Acts Unlawfully*, 70 WASH. L. REV. 779 (1995). For a discussion of some of these limits in the new legislation, see Benson, *supra* note 115.

129. *See* Robert H. Gibbs, *It Ain't Over 'Til It's Over: Amnesty Issues Persist A Decade After IRCA*, 73 INTERPRETER RELEASES 1493 (Oct. 28, 1996). Robert Gibbs notes that over 2.6 million people legalized their status under the IRCA programs but that tens of thousands of claims were still pending ten years later. This article also describes several class actions brought on behalf of people who failed to file claims for legalization due to the INS's improper regulations.

130. Two national class actions resulted in over 400,000 late applications. *See id.* at 1502.

131. 509 U.S. 43 (1993).

legalization but did not apply due to the erroneous INS policy. The Supreme Court vacated the order and remanded to the lower court to determine whether members of the class had actually had their applications rejected[132] or who could otherwise articulate a justiciable claim.[133] On remand, the district court narrowed the class to include persons who had actually filed an application and those who might have filed a claim but for the front desk rejection policy.[134]

Frustrated over the delays in adjudicating the IRCA legalization claims, Congress specifically addressed this and other similar class actions by limiting federal court jurisdiction to those persons who "in fact filed an application . . . or attempted to file a complete application . . . with an authorized legalization office of the Service but had the application and fee refused by that Officer."[135] The government moved to dismiss the amended class based on this new jurisdictional statute. On April 30, 1997, the Ninth Circuit dismissed the reconstituted class and upheld the constitutionality of Section 377.[136] The Ninth Circuit rejected the plaintiffs' assertion that the new statute violated the separation of powers by finding that the statute was changing the law applicable to the case rather than interfering with the judicial process.[137] The Ninth Circuit also found that the statute did not completely immunize the policy from constitutional attack so as to raise due process concerns because the statue only restricts claims to "those who have been directly affected by INS conduct."[138] Attorneys for the plaintiffs in a similar case have filed an amended complaint asserting jurisdiction

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132. The INS had a policy which instructed employees of the legalization offices or the designated agencies to reject the applications of those who appeared statutorily ineligible at the "front desk." *See id.* at 61-62.

133. A footnote in the opinion suggested the possibility that other persons could maintain a justiciable claim even though they had not been directly "front-desked." *See id.* at 66 n.28.

134. Unpublished order, described in the 9th Cir. decision at 1997 U.S. App. LEXIS 9094, at *6.

135. IIRAIRA § 377 (amending INA § 245A(f)(4)). Section 377(b) stated that the amendment "shall be effective as if included in the enactment of [IRCA]." The Conference committee report described this section as intended to "put an end to litigation seeking to extend the amnesty provisions of [IRCA], and to limit claims under that section to aliens who in fact filed an application for legalization under that section within the prescribed time limits, or attempted to do so, but their application was refused by an immigration officer." H.R. CONF. REP. NO. 104-828, at 230 (1996).

136. *See* Catholic Soc. Servs., Inc. v. Reno, No. 96-15495, 1997 U.S. App. LEXIS 9094 (9th Cir. Feb. 11, 1997).

137. *See id.* at *11-12 (citing Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992) (upholding a similar Congressional statute which directly affected pending cases)).

138. *Id.* at *13.

for a national class action under the writ of habeas corpus.[139]

Congress was also growing concerned over the numbers of noncitizens convicted of crimes, noncitizens incarcerated in state and federal prisons, and the relatively low number of deportations of convicted criminals. In a series of bills from 1988 to 1994, Congress amended the grounds of deportability to increase the ability of the INS to deport noncitizens. In an effort to expedite the deportation and removal process, Congress created a form of ministerial deportation.[140] This procedure bypassed the normal administrative hearing, administrative review and judicial review except in a very narrow form.[141] In this special procedure, the noncitizen would receive a form, A Notice of Intent to Deport, from a deportation officer of the INS.[142] The noncitizen would then be allowed ten days to present a written rebuttal stating the grounds for why the person should not be deported.[143] A different officer of the deportation section would review the rebuttal and had the power to order the person deported. No other procedure was authorized except that the noncitizen could seek judicial review in the form of a habeas petition limited to the issues of alienage, identity, and proof of conviction.[144]

In the next section, I will explore some of the factors which motivated Congress to adopt the 1996 legislation. I will describe the judicial review provisions of the 1996 legislation in Part IV.

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139. *See* Gibbs, *supra* note 129, at 1502 (discussing LULAC v. INS, 956 F.2d 914 (9th Cir.), *rev'd and remanded on jurisdictional ground sub. nom.* Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43 (1993), and renamed *Newman v. INS* after the filing of an amended complaint).

140. These procedures were never widely implemented. In IIRAIRA, Congress repealed the statutory authority, replacing it with different streamlined procedures. *See infra* note 164 and discussion in Part IV.

141. *See* Pub. L. 103-416, Tit. II, §§ 223(a), 224(a), 108 Stat. 4322.

142. *See* former INA § 242A.

143. *See id.*

144. *See id.* § 106(d). Although the statute apparently created a limited form of habeas corpus procedure, nothing in the statute eliminated the general grant of habeas corpus statutory authority in 28 U.S.C. § 2241. As will be discussed below, courts may view the failure to expressly repeal this other authority as a preservation of the writ of habeas corpus. *See* discussion of implied repeal of habeas corpus *infra* Part V.

III. CONGRESS AND THE 1996 IMMIGRATION REFORMS "ONCE MORE UNTO THE BREACH!"[145]

A number of highly publicized events and political factors led Congress to reform judicial review of immigration actions. Immigration law became a prominent subject of political debate.[146] Immigration policy was debated by candidates for the presidency,[147] was the subject of state wide referenda,[148] and was a frequent topic in both state and congressional elections. Many state governments began calling for the federal government to do "something" about illegal immigration.[149] The

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145. WILLIAM SHAKESPEARE, HENRY V act 3, sc. 1. The rhetoric of battle or war is often used in the debates of immigration policy.

146. Immigration law and policy is consistently front page news. A search on NEXIS reveals that between January of 1994 and May of 1997, the *New York Times* has published 23 articles on immigration related topics on its front page, and in California, where the topic receives much more attention, the *Los Angeles Times* has published 462 articles on immigration related topics on its front page since 1994.

147. Some GOP candidates took extreme positions on immigration policy. Governor Pete Wilson pushed for a constitutional amendment to deny citizenship to children born on United States soil to undocumented noncitizens. *See* Ronald Brownstein, *Immigration Debate Splits GOP Hopefuls*, L.A. TIMES, May 14, 1995, at A1. Patrick Buchanan took the most extreme position, calling for a complete moratorium on most forms of immigration. *See id.* Currently, there are several bills pending in the House of Representatives that would either amend the Constitution or the INA in an effort to restrict birth right citizenship. *See* H.R.J. Res. 60, 105th Cong. (1997) (amending the Constitution); H.R.J. Res. 26, 105th Cong. (1997) (same); H.R.J. Res. 4, 105th Cong. (1997) (same); H.R. 7, 105th Cong. (1997) (amending the INA).

The Democratic National Platform welcomed legal immigration and supported legal immigration policies but called for greater efforts to control illegal immigration. *See* 1996 PRESIDENTIAL CAMPAIGN PRESS MATERIALS, *1996 Democratic Platform, Position Paper*, Aug. 28, 1996.

148. Proposition 187 in California was adopted in 1994 by nearly 60% of the votes cast. *See* CAL. EDUC. CODE § 48215(a) (West Supp. 1995); CAL. HEALTH & SAFETY CODE § 130(a) (West Supp. 1995); CAL. WELF. & INST. CODE § 10001.5(c) (West Supp. 1995). Proposition 187 prohibited the state of California from providing health, welfare, or schooling to undocumented aliens. The proposition has been enjoined by the Federal District Court in Northern California primarily on the basis that immigration law is preempted by federal legislation and the state cannot permissibly seek to regulate this area. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995) (order granting preliminary injunction), *aff'd sub. nom.* Wilson v. City of San Jose, 111 F.3d 688 (9th Cir. 1997). Initially, the conference report for IIRAIRA had provisions similar to Proposition 187, known as the Gallegly Amendment; however, this amendment was dropped due to an explicit veto threat from President Clinton. *See* 142 CONG. REC. H11071 (1996).

149. Several states also filed suit against the federal government seeking reimbursement for the cost to the state associated with the presence of undocumented aliens. State claims included unreimbursed medical expenses, welfare, schooling expenses, and housing. The suits argued that the federal government failed to adequately enforce the immigration laws both in preventing undocumented migration and in removing aliens found to be in violation of the laws. All of these suits were dismissed for failing to state a claim for relief. *See e.g.*, Texas v. United States, 106 F.3d 661 (5th Cir. 1997); California v. United States, 104 F.3d 1086 (9th Cir.

media and political statements often referred to an "out of control" border.[150] Others wanted to reduce the numbers of legal immigrants.[151] The push for change occurred before the work of the United States Commission on Immigration had completed its study of existing immigration policy.[152] Many opponents to immediate legislative change argued that the reforms of the prior major legislation, or of the agency reforms, were not yet fully implemented.[153]

1997); Chiles v. United States, 69 F.3d 1094 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1674 (1996); New Jersey v. United States, 91 F.3d 463 (3d Cir. 1996). In one case, state counties sued the federal government. *See* Padavan v. United States, 82 F.3d 23 (2d Cir. 1996) (suit by New York state counties and legislators). IIRAIRA also contains provisions which allow reimbursement to states for the cost of incarcerating illegal immigrant felons. *See* INA § 241(i).

150. The rhetoric used to discuss this complex issue is often that used to describe invasions of enemies or pestilence. For example, the press routinely used imagery of invasion in reporting the foundering of the ship, the Golden Venture, in New York Harbor. The Golden Venture was operated by smugglers and carried approximately 285 people who sought illegal entry to the United States. *See* Robert McFadden, *Smuggled to New York: The Overview—7 Die as Crowded Immigrant Ship Grounds Off Queens; Chinese Aboard Are Seized for Illegal Entry*, N.Y. TIMES, June 7, 1993, at A1. Governor Pete Wilson and the Proposition 187 campaign used video footage of illegal entries at the Mexico border in campaign television commercials. *See* Dennis Love, *Demagogue or Savvy Tactician? Can Pete Wilson Turn Proposition 187, Affirmative Action Into His Issue?*, THE ARIZONA REPUBLIC, Apr. 9, 1995, at F1.

Others analogize immigration to environmental disasters. For an excellent discussion of the inappropriate use of terms describing environmental pollution or abuse in the context of immigration policy, see Peter L. Reich, *Environmental Metaphor in the Alien Benefits Debate*, 42 UCLA L. REV. 1577 (1995). Professor Kevin Johnson has also written about the inappropriate images used to describe noncitizens. *See* Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139 (1993).

151. Congress did not enact the express limits on numbers and qualifications of new immigrants originally proposed. Congress did raise the income level required to sponsor family members for immigration. *See* INA § 213. It may be that this change and others will in fact reduce the number of people who qualify for legal immigration.

152. The United States Commission on Immigration Reform, headed by the late Barbara Jordan, was in the process of conducting a study which was to be published in June 1997 which would provide recommendations concerning permanent and temporary legal immigration to the United States. *See* Testimony of Barbara Jordan, Chair, U.S. Commission on Immigration Reform Before the Subcomm. on Immigration and Claims, House Judiciary Comm., Feb. 24, 1997. However, IIRAIRA was passed prior to the issuance of the commission's report, and many Democrats in the House complained that the House Conference Report was issued without their input. *See* 142 CONG. REC. H11071 (1996). The Commission had issued a report which called for better enforcement of the existing immigration laws. *See* RESTORING CREDIBILITY, U.S. COMMISSION ON IMMIGRATION REFORM (1995).

153. For example, many non-profit advocacy organizations argued that reforms such as expedited removal at the ports of entry were not needed since regulatory changes had greatly reduced the number of applications for political asylum. *See* 142 CONG. REC. S11886-01, 11906-11907 (1996).

Nevertheless, in 1996, Congress adopted several statutes which changed the enforcement of the immigration laws and, in many cases, the ability of people to immigrate to this country. First came the AEDPA, which was adopted by Congress near the anniversary of the bombing of the Federal Court building in Oklahoma City in April of 1995.[154] On its face, this bill precluded aliens convicted of certain criminal offenses from seeking judicial review of final orders of deportation or exclusion.[155] Then on the last day of the session, Congress attached to one of the appropriations bills the IIRAIRA.[156] IIRAIRA primarily concerns the ability of the INS to enforce the immigration laws of the United States. The statute blends together the formerly separate exclusion and deportation hearings by substituting a new "removal" proceeding and creates a form of expedited removal at border posts,[157] eliminates several forms of relief from deportation,[158] restricts

154. The immigration portions of the bill were in part originally inspired by the fear that the bombing in Oklahoma City had been the work of foreign terrorists. In June of 1997, Timothy McVeigh, a native born United States citizen and former member of the armed forces, was tried and convicted of conspiracy and murder in connection with the bombing. Even though there were no allegations that the Oklahoma bombing was in any way linked to foreign terrorists groups, some members of Congress were also seeking to speed the deportation of aliens after the delay in removing Sheik Rahman, the Egyptian cleric who was convicted of inspiring the bombing of the World Trade Center. *See* 142 CONG. REC. S3352-01 (1996) (Senator Hatch argued that the passage of AEDPA will help in the expedient trial and sentencing of the perpetrators of the Oklahoma City Bombing. Senator Bieden argued that the World Trade Center Bombing, along with Oklahoma City and the Locherbe, Scotland disaster, where a PanAm plane exploded due to a terrorist bomb, have made it necessary to pass the bill.). Sheik Rahman had been admitted to the United States as a tourist. He delayed his deportation by applying for political asylum. When his application for asylum was denied he obtained the usual stay of deportation while he pursued judicial review of the denial of his application. *See* Robert D. McFadden, *The Twin Towers: The Overview: Agents Step Up Search for Bombing Suspect's Links*, N.Y. TIMES, Mar. 6, 1993, at A1. Sheik Rahman was convicted of conspiracy to bomb the World Trade Center and sentenced to life in prison.

155. The AEDPA also removed the ability of some criminal aliens to seek a waiver of exclusion or deportation available if the alien had held lawful domicile for seven years and could demonstrate that he or she would face extreme hardship if deported or excluded. This waiver was called the section 212(c) waiver.

156. *See supra* note 5.

157. Although the statute appears to attempt to eradicate the differences which have been inherent in exclusion and deportation proceedings by creating a single type of "removal proceeding," many of the former distinctions between exclusion and deportation continue to be preserved, such as the differences in burdens of proof. The expedited removal provisions grant the INS authority to disregard the entry doctrine by treating some people who are physically within the United States territory as if they had not made an entry because they have not been inspected and admitted. *See* INA § 235(b)(1)(iii)(II). The entry doctrine reflected both statutory and constitutional differences between the treatment of noncitizens within the territory of the United States and those seeking admission at a port of entry. *See* Stanley Mailman, *"Admis-*

preexisting waivers and discretionary forms of relief, creates new bars to political asylum, including a time limit of one year from entry for such applications, and attempts to remove federal court review of administrative action or severely curtail the scope and type of review available.[159] IIRAIRA also completely repealed the former statutory

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sion" and "Unlawful Presence" in the New IIRAIRA Lexicon, in 2 IMMIGRATION & NATIONALITY LAW 1 (1997) (discussing historical development of entry doctrine and the impact of IIRAIRA changes).

The ability of Congress to eliminate the entry doctrine presents a serious question which implicates the tradition of recognizing that the Constitution requires greater due process protections for those noncitizens within the territorial borders of the United States. The wisdom of the entry doctrine has long been the subject of debate. *See* T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237 (1983) (arguing that the Constitution should not be interpreted differently for people depending on their immigration status); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 230-34 (1983) (arguing that people who make illegal entries should not be afforded the same levels of due process as lawful entrants). This debate about the proper legal treatment of people who have made illegal entries is also summarized as a dialogue in ALEINIKOFF ET AL., *supra* note 36, at 505-10. It is beyond the scope of this Article to discuss the entry doctrine, but I note it here as one of the many important examples of constitutional questions presented by the new legislation. Its is hardly coincidental that Congress is limiting federal court jurisdiction at the very same moment that it seeks to statutorily overturn a long-established judicial doctrine which afforded noncitizens greater due process protection. IIRAIRA also changed the re-entry doctrine for returning lawful permanent residents by defining a safe harbor period of six months absence during which a lawful permanent resident could return without having to re-establish admissibility. *See* INA § 101(a)(13). But although this safe harbor may seem beneficial, it is not necessarily consistent with the principles of due process which lead to the creation of the *Fleuti* doctrine, a judicially created exception to the re-entry doctrine for brief, casual, and innocent departures. *See* Fleuti v. Rosenberg, 374 U.S. 449 (1963).

158. For example, the elimination of suspension of deportation relief, *see* former INA § 244, was in direct response to the myth that aliens applying for suspension of deportation often abused this form of relief by delaying deportation proceedings until the requisite seven years had been established. *See* H.R. REP. NO. 104-469, pt. 1, at 122 (1996). By stripping or limiting noncitizens of various forms of relief, Congress completely disregarded a report issued by the Attorney General which had determined that noncitizens were not abusing the immigration system. *See Justice Dept. Finds Aliens Not Abusing Requests for Relief*, 68 INTERPRETER RELEASES 901 (July 22, 1991). This report was submitted to allay Congress' fears that deportable or excludable people were prolonging their stays in the United States by failing to consolidate their requests for discretionary relief. The Justice Department concluded "that the number of cases in which aliens file multiple applications for relief or motions to reopen comprise less than five percent of the total caseload." *Id.* For an analysis of how the new cancellation of removal provisions and the restrictions on judicial review will result in the likelihood of arbitrary and unjust decisions, see William C.B. Underwood, *Note: Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases*, 72 IND. L.J. 885 (1997).

159. For Congress, the limitation on the availability of judicial review was implemented to eradicate the delay in the removal of noncitizens from the United States. However, this basis is nothing more than a myth. As an empirical matter, judicial review of immigration proceed-

section governing judicial review of deportation and exclusion proceedings which had been in place since 1961.[160] The judicial review provisions of the recent legislation are described in detail in Part IV.

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ings is not the major, or even a significant, cause of delay in the removal of noncitizens. In March 1996, the Inspector General conducted a random review of 1,000 files and concluded that the INS failed to remove 89% of the people who had outstanding final orders of deportation, but were not in the current detention of the agency. Of those detained, the INS was able to remove 94%. *See* U.S. Department of Justice, Office of the Inspector General Inspection Report, March 1996, Report No. I-96-03. This disparity might suggest that increased detention should immediately be implemented to increase the rate of removal. I dispute that assumption for a variety of reasons including the increased cost along with purely humanitarian concerns. Nevertheless, the point is that these were final orders. There was no judicial review barring the agency's ability to remove the alien, and the agency did not argue that judicial review had prevented the removal of the aliens.

Examining this from another angle, in fiscal year 1996, the Immigration courts (not including the Board of Immigration Appeals ("BIA")) heard 262,572 cases, and completed approximately 246,426. *See Prepared Statement of Paul W. Schmidt, Chairman, Board of Immigration Appeals, before the House Judiciary Committee Immigration and Claims Subcommittee concerning IIRAIRA*, Federal News Service (February 11, 1997). These completed cases included 150,121 removal (deportation, exclusion, and voluntary departure) orders; 7,469 grants of suspensions of deportation; 2,561 waivers under 212(c); 5,140 grants of asylum; and 4,138 adjustments of status. *See id.* The Executive Office for Immigration Review anticipates approximately 300,000 cases for fiscal year 1997, with completed cases ranging from 270,000 to 280,000, and for fiscal year 1998, the BIA expects approximately 325,000 cases and hopes to complete between 290,000 and 300,000. *See id.* The BIA, in fiscal year 1995, heard approximately 17,500 cases, with completed cases at roughly 12,000. *See id.* In fiscal year 1996, the number of cases rose 20,423, with completed cases rising by approximately a third to 16,721. *See id.* Of those 16,721 cases, 9,558 removal orders were issued. *See id.* The BIA projects approximately 24,000 cases in 1997, with completed cases between 20,000 and 22,000. *See id.* And for fiscal year 1998, Mr. Schmidt recognized that the effects of IIRAIRA will be "felt at the appellate level," projecting a caseload increase to at least 26,000. *See id.*

Moreover, in their important 1990 study evaluating the number of immigration cases in federal courts, Peter Schuck and Theodore Wang found that deportation appeals increased from twenty-three in 1979, to 111 in 1990, and exclusion appeals increased from two cases in 1979, to eight in 1990. *See* Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 STAN. L. REV. 115, 136 (1992). From 1991 to 1996, a search replicating the methodology used in that study found 208 cases in 1991, in 1992 and 1993, 204 and 284 cases respectively, in 1994 and 1995, 344 and 391 cases respectively, and 401 cases in 1996.

Therefore, I submit judicial review is not the root of our immigration system's problems. Congress' fear that noncitizens are exploiting the system has no basis in fact. I do not assert that judicial review may never cause delays; however, the percentage of possible cases is extremely small in comparision to INS's failure to remove non-detained aliens with final orders of removal. Further, even with a minute number of cases seeking judicial review, the current legislation still does not reach Congress' goal of streamlining since it does not have the power to eliminate the writ of habeas corpus. As discussed in Part V, habeas corpus can be used to delay and frustrate expeditious removal.

160. Former section 106 of the INA was repealed and replaced by new INA § 242.

IV. THE JUDICIAL REVIEW PROVISIONS OF THE 1996 IMMIGRATION LEGISLATION

In AEDPA, Congress focused on the deportation of noncitizens convicted of crimes. Congress amended the general grant of jurisdiction contained in former section 106 to limit the scope of judicial review of deportation or exclusion orders. AEDPA provided that persons convicted of "aggravated felonies"[161] and ordered deported after a deportation hearing and administrative review before the Board of Immigration Appeals could not seek judicial review.[162] The exact language of the bar is "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a [statutorily covered] criminal offense."[163]

When Congress enacted AEDPA, there were several other immigration bills pending in the House and Senate.[164] These bills were not

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161. AEDPA expanded the definition of an aggravated felony. *See* AEDPA § 440(e). The definition was amended again in IIRAIRA § 321, codified as INA § 101(a)(43). *See infra* note 164.

162. AEDPA also removed several forms of relief from deportation for people convicted of crimes. One form of relief eliminated was the discretionary waiver available to long-term permanent resident aliens, known as the 212(c) waiver. See *infra* note 276 and accompanying text for a discussion of the bar to section 212(c) relief in exclusion proceedings.

The BIA interpreted AEDPA as preserving 212(c) relief in exclusion proceedings. *See In re* Fuentes-Campos, Int. Dec. 3318 (BIA 1997). The statutory disparity between relief available to people in exclusion versus people in deportation had led the Second Circuit to find that failure to extend 212(c) relief to people in deportation would violate equal protection. *See* Francis v. INS, 532 F.2d 268 (2d Cir. 1976). Because of *Francis*, the INS eventually allowed lawful residents in either exclusion or deportation to apply for the waiver. The new disparity has also lead to equal protection challenges. *See* Vargas v. Reno, 966 F. Supp. 1537 (S.D. Cal. 1997) (finding BIA interpretation irrational given the subsequent repeal of section 212(c) in IIRAIRA). Congress also repealed section 212(c) and replaced it with a cancellation of removal for lawful permanent residents. *See* INA § 240A. IIRAIRA purports to eliminate the distinction between exclusion and deportation proceedings. It is much more difficult to meet the statutory prima facie requirements under the new cancellation of removal provisions. For a very clear examination of the relief available after IIRAIRA, see Nadine Wettstein, *The 1996 Immigration Act: New Removal Proceedings, Cancellation of Removal, and Voluntary Departure*, 73 INTERPRETER RELEASES 1677 (Dec. 9, 1996).

163. *See* AEDPA § 440a.

164. *See, e.g.*, S. 269, 104th Cong. (1995) (introduced by Sen. Alan K. Simpson in early 1995), *discussed in* 72 INTERPRETER RELEASES 169, 653 (1995); S. 1394, 104th Cong. (1995) (reform bill aimed at legal immigration, also introduced by Senator Simpson), *discussed in* 72 INTERPRETER RELEASES 1605; S. 754, 104th Cong. (1995) (the Administration's Immigration Reform Bill), *discussed in* 72 INTERPETER RELEASES 377 (1995); H.R. 1915, 104th Cong. (1995) (introduced by Rep. LaMar Smith of Texas), *discussed in* 72 INTERPRETER RELEASES 943 (1995), H.R. 2202, 104th Cong. (1995) (also introduced by Rep. Smith), *discussed in* 72 INTERPRETER RELEASES 1303, 1371, 1447, 1481 (1995); and S. 1664, 104th Cong. (1995) (which passed the Senate

limited to restricting judicial review for people convicted of aggravated felonies. At the end of the session, the Congress adopted IIRAIRA and its sweeping changes to judicial review.

IIRAIRA eliminates the former section 106 entirely and replaces it with a provision which, in some circumstances, allows judicial review in the circuit courts of appeals.[165] However, the new provision limits the availability of the petition for review for people in disfavored groups or for people presenting disfavored claims.[166]

A. *Disfavored Groups*

1. *People with Criminal Convictions*

The principally disadvantaged group contains people in regular removal proceedings who have been convicted of crimes.[167] It is diffi-

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on May 2, 1996 and, along with H.R. 2202, became the basis for IIRAIRA).

165. *See infra* Chart 1 (illustrating the general judicial review process under INA § 106 (repealed 1940)). For additional diagrams of the prior judicial review process, see ALEINIKOFF ET AL., *supra* note 36, at 932-33. IIRAIRA also revised INA § 279, which gave federal district courts subject matter jurisdiction over some types of immigration claims. The amendment eliminates the jurisdiction except for claims brought by the United States government. Section 279 was used in support of lawsuits which were not seeking judicial review of deportation or exclusion orders, but were challenging some type of INS action outside the scope of an exclusion or deportation order. *See* discussion of INA § 279 *supra* note 115. For a discussion of the impact of the elimination of section 279 as a basis for subject matter jurisdiction for claims against the United States government, see STEPHEN H. LEGOMSKY, IMMIGRATION LAW & POLICY 350-53 (1992).

166. *See* INA § 242. In the general case, where the petitioner is not one of the disfavored groups or making a disfavored claim, the petition for review is filed in the circuit court of appeals within thirty days of the final order of removal. *See id.* § 242(b)(1). Most importantly, the filing of the petition no longer creates an automatic stay of removal, although a stay may be requested. *See id.* § 242(b)(3)(B). For a discussion of the petition for review process, see Benson, *supra* note 115, at 32. A diagram of the judicial review process for the general case is found in Chart 2 at the end of this Article. Note that the use of italic type in the chart represents my analysis of additional avenues for judicial review via the writ of habeas corpus. The petition for review must be filed within thirty days of the BIA's final order. This is a reduction from the 90 days previously authorized in section 106. Section 242 also changes the venue for the petition. It must be filed in the circuit where the removal hearing took place. *See* INA § 242(b)(2). Previously, the petition could also be filed in the circuit where the noncitizen resided. *See* INA § 106(a)(2) (repealed 1940). This may be a great tactical advantage for the INS because of the increased used of detention in connection with removal proceedings. When a noncitizen is detained, the INS can select the site of the detention. Some of the largest detention centers are located in Oakdale, in rural Louisiana, and Krone, in Southern Florida. These centers are within the Fifth and Eleventh Circuits, respectively. These particular circuits have generally been viewed as less willing to overturn INS administrative decisions. The INS regularly limits the application of cases to the physical jurisdiction of each circuit. *See* Steve Y. Koh, *Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals*, 9 YALE L. & POL'Y REV. 430 (1991).

167. See Chart 3 at the end of this Article for a diagram of the judicial review process for

cult to summarize the types of convictions which will result in the bar to judicial review. It is misleading to say that the bar applies only to those with felony convictions or particularly serious crimes. The statute lists a broad range of criminal conduct that can lead to the application of this bar.[168] Relatively minor criminal offenses can result in the loss of the right to file a petition for review.[169]

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people convicted of certain crimes as expressly provided in the INA. Chart 4 provides my analysis of the judicial review process when the writ of habeas corpus is added and the ability to contest inclusion in the disfavored group is preserved in the petition for review. These default grants of jurisdiction are explained later in this section.

Judicial review for people in judicial removal or ministerial removal is described below. "Ministerial" removal refers to a procedure that replaces the "administrative deportation" procedure set forth in INA § 242A (repealed 1996). Although these procedures have been usually referred to as administrative removal, I have used the term "ministerial removal" to distinguish them from the standard removal proceeding which occurs before an immigration judge. In ministerial removal, the removal decision is handled solely by non-judicial officers of the INS and no administrative hearing or administrative appeal is a part of the procedure. It is possible that the failure to have an independent hearing officer may in and of itself present a constitutional procedural due process violation. In *Marcello v. Bonds*, 349 U.S. 302 (1955), the Supreme Court had rejected a challenge to immigration proceedings which were presided over by hearing officers who were not independent of INS management or control. In 1984, the Department of Justice reorganized the INS to create the Executive Office of Immigration Review ("EOIR"). EOIR hires and manages the Immigration Judges and the staff of the Board of Immigration Appeals. EOIR's management and hiring procedures differ from those of the general INS. This structure is described in *Forum Choices, supra* note 114. The ministerial procedure would be conducted without the participation of any member of EOIR.

168. Moreover, the statute broadened the definition of conviction to include a wide variety of criminal sentencing procedures, such as deferred adjudication of guilt or suspended sentences which in standard criminal law might be thought to abate the collateral consequences of a regular conviction. *See* INA § 101(a)(48)(A). As one commentator has noted:

> Section 101(a)(43) of the INA . . . began as one paragraph in 1988. Eight years later the provision consists of twenty-one paragraphs . . . . In 1988 the statute identified three general crimes. Today over fifty crimes or general classes of crimes are enumerated.
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> . . . .
>
> [A]lmost all crimes in which the sentence [could be] over one year probation or prison time will be considered aggravated felonies . . . .

Richard L. Prinz, *Criminal Aliens Under the 1996 Immigration Reform Act, in* INTRODUCING THE 1996 IMMIGRATION ACT 62, 64-66 (1996). For a general discussion of criminal convictions and collateral consequences, see Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269 (1997). *See generally* DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES (1997).

169. For example, under these provisions,

> a legal permanent resident convicted of one minor drug possession charge, or two misdemeanor petty theft or public transportation fare evasion charges—turnstile jumping in the New York City subway system leading to a crime of 'theft of services' misdemeanor conviction is considered a crime of 'moral turpitude'—is now subject to automatic deportation without any opportunity to [apply for § 212(c) relief].

Yesil v. Reno, 1997 WL 394945, at *13 (S.D.N.Y. July 15, 1997) (quoting Moiica v. Reno,

Congress simultaneously preserved judicial review for two groups of people in immigration proceedings.[170] First, judicial review is preserved for a noncitizen, of any immigration status, who is convicted of a crime in a federal court and who is ordered removed as part of the *judicial* proceeding. These individuals may challenge the conviction and the order of removal in the court of appeals.[171] The second group includes those individuals who are processed in the special ministerial administrative deportation procedure which eliminates the immigration judge and Board of Immigration Appeals.[172] In this procedure, a removal or deportation officer presents the nonresident with a written notice of intent to remove. The nonresident is then afforded ten days to present written rebuttal to the notice. The rebuttal is reviewed by a second deportation officer who is empowered to issue a final order of removal.[173] This procedure can be selected by the INS for use with people who have not acquired lawful permanent resident status and have been convicted of an aggravated felony. Although this purely ministerial removal process bypasses the administrative hearing and administrative appeals, it does expressly mention judicial review of the administrative action.[174] It seems anomalous that a resident alien is refused direct judicial review, while a person who may have no legal status receives it.[175]

Nos. CV 97-1085, CV 97-1869, 1997 U.S. Dist. LEXIS 8959, at *9 (E.D.N.Y. June 24, 1997)).

170. *See infra* Chart 3.

171. *See* INA § 238(c)(3)(A)(i). The appeal is to be "considered consistent with the requirements of section 242." *See id.* § 238(c)(3)(A)(ii).

172. *See id.* § 238.

173. *See id.* § 238(b)

174. *See* INA §§ 238(b)(4)(E). This language bolsters the analysis that at least removability is subject to review. *See* discussion *infra* text accompanying note 179.

175. Noncitizens may prefer the administrative hearing procedures and administrative appeal to the ministerial procedure in INA § 238 as the administrative process provides more opportunities to defeat removability or takes longer. Why would Congress afford an express right to judicial review for the individual with no legal status? If efficiency was the primary goal, why did Congress provide for appellate review of judicial deportation orders originating in district court? Perhaps lawful permanent residents would make an equal protection argument that Congress has no rational reason for eliminating judicial review for the lawful permanent resident while preserving this right for the nonresident alien in judicial removal proceedings. Such an argument was upheld in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), to establish the right of lawful permanent residents to apply for the discretionary waiver of excludability found in former INA § 212(c). Congress had provided for a waiver for legal residents in exclusion proceedings but not in deportation proceedings. The court found no rational reason for the distinction. In section 238, the lawful permanent resident appears to lose direct (other than habeas) judicial review, while the nonresident in judicial removal is expressly granted a right to

Although Congress may have wanted to prevent litigation over the issue of when the bar on judicial review applies, the Ninth Circuit Court of Appeals ruled that the court has jurisdiction to determine if the statutory bar was applicable.[176] In *Coronado-Durazo*, the petitioner disputed that his conviction for solicitation to possess cocaine was subject to the jurisdictional bar on judicial review under AEDPA. Given the use of imprecise terms such as "crimes of moral turpitude" to define who is within this disfavored group, it can be expected that other petitioners will dispute their inclusion in the barred group.[177] It is also probable that petitioners will seek judicial review of the merits of the order of removal, arguing that they cannot be subject to the bar on judicial review until it is judicially established that the predicate facts and legal issues establish their membership in the disfavored group.[178]

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judicial review.

176. Coronado-Durazo v. INS, 108 F.3d 210 (9th Cir. 1996), petition for rehearing denied and new opinion substituted 1997 U.S. App. LEXIS 26900 (Sept. 28, 1997). The Ninth Circuit exercised the jurisdiction granted under former INA § 106 in order to determine if the convictions had stripped the court of its jurisdiction. *See also* Choeum v. INS, 113 F.3d 17 (1st Cir. 1997) (court retained jurisdiction to consider whether noncitizen was member of barred class); Anwar v. INS, 116 F.3d 140, 141-44 (5th Cir. 1997) (finding that conviction did not meet the definition of preclusion statute). *But cf.* Berehe v. INS, 114 F.3d 159 (10th Cir. 1997) (finding that Congress meant to preclude challenges to the finding of deportability as well as to claims for relief).

177. There are many circuit court of appeals decisions which discuss the BIA's evaluation of the nature of moral turpitude or other issues about the classification of the crimes. *See, e.g.*, Goldeshtein v. INS, 8 F.3d 645 (9th Cir. 1993) (rejecting INS conclusion that conspiracy to violate the federal currency laws and violations of currency reporting laws were crimes of moral turpitude rendering the noncitizen deportable under former INA § 2421(a)(4)). *See also* KESSELBRENNER & ROSENBERG, *supra* note 168, § 6.7, App. E. In the casebook IMMIGRATION PROCESS AND POLICY, the authors question whether Congress has invited the agency and courts to legislate by using such a vague term as "moral turpitude." *See* ALEINIKOFF ET AL., *supra* note 36, at 551.

178. This challenge might be based on both statutory and constitutional claims. The statute requires the evidence of removability to be supported by clear, convincing, and probative evidence. *See* INA § 240(c)(3)(A). In *Woodby v. INS*, 385 U.S. 276, 277 (1966), the Supreme Court interpreted this phrase to require "clear, unequivocal, and convincing evidence." It is unclear whether the *Woodby* ruling is based on an interpretation of the statute or whether this standard is mandated by the due process clause, but nothing in IIRAIRA alters the statutory standard of proof. Noncitizens will certainly argue that the holding of *Woodby* requires judicial review to test whether the evidence meets this standard. Hiroshi Motomura discusses *Woodby* and the Supreme Court's avoidance of direct reliance on the Fifth Amendment. *See* Motomura, *Phantom Constitutional Norms*, *supra* note 9, at 572-74. The Tenth Circuit ruled that IIRAIRA (AEDPA) removed the jurisdiction of the courts of appeal to consider the merits of the deportation (removal) order. *See Berehe*, 114 F.3d 159. Nevertheless, the Tenth Circuit exercised its jurisdiction to determine whether the convictions were "crimes of moral turpitude" which would eliminate the petitioner's claims for discretionary relief. The petitioner had also not challenged the grounds of deportability but conceded them in the immigration hearing.

2. *People Subject to Expedited Removal*

One of the most controversial areas of eliminating judicial review concerns the lack of administrative and judicial review for persons subject to the new expedited removal provisions.[179] These individuals have been refused entry by an admission officer because the officer finds they lack valid entry documents[180] or have made a misrepresentation in seeking admission.[181] The statute grants a limited form of administrative review of the inadmissibility determination before an immigration judge only if the applicant is making one of two "special claims": (1) a new claim of asylum, or (2) prior admission as a lawful permanent resident, asylee, or refugee.[182] From this limited administra-

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179. See *infra* Chart 5 for a diagram of expedited removal and judicial review as envisioned by IIRAIRA and the implementing regulations. The text in italics represents my analysis of available judicial review via habeas corpus and declaratory judgment actions.

180. This Article has not explored the use of habeas corpus by noncitizen "stowaways" who have traditionally had few statutory or constititonal rights. *See, e.g.*, Garcia-Mir v. Smith, 469 U.S. 1311 (1985) (allowing habeas corpus under 28 U.S.C. § 2241 and INA § 106(a), but limiting the scope of review to the jurisdictional facts which lead to the preclusion of review or statutory relief). Due to the special status of stowaways, I am not suggesting that these are the appropriate precedents for the determination of the future scope of review under the habeas statute. *See* 3 GORDON ET AL., *supra* note 2, at § 81.04[b]. INA § 235(a)(2) contains provisions for stowaways which state that they are not eligible to apply for admission, nor are they eligible for a section 240 hearing. They may, however, apply for asylum and this may lead to bring this claim before an immigration judge. *See* Fang-Sui Yau v. Gustafson, 623 F. Supp. 1515 (C.D. Cal. 1985) (granting a writ of habeas corpus and remanding for a hearing before the IJ to determine eligibility for asylum).

181. Section 235 refers to inadmissibility pursuant to sections 212(a)(6)(C) and 212(a)(7). These grounds of inadmissibility are broader than they may first appear. The grounds have been used to exclude persons who present a valid, unexpired nonimmigrant visa. If the inspector does not agree that the visa category is appropriate for the purpose of the applicant's visit, the inspector may find the person inadmissible for lack of documentation. *See* INA § 212(a)(7). For example, a business person with a valid B-1 business visitor visa may be refused admission if the officer believes that the business person will actually perform "work" and be compensated for that work in the United States. Before expedited removal, the business visitor could challenge the admission decision in an exclusion hearing before an immigration judge. The visitor could also appeal the judge's ruling to the BIA. *See, e.g.*, Matter of Opferkuch, 17 I&N Dec. 158 (BIA 1979) (employee of foreign-owned business may use the business visitor visa when his sole purpose is to gather information for his company on a temporary basis). *But cf.* Matter of Neill, 15 I&N Dec. 331 (BIA 1975) (engineer denied admission as business visitor because his visit to consult with clients in the United States was not of a temporary nature). See *infra* note 182, for a discussion of possible habeas challenges to admission decisions.

182. INA § 242(e)(4) creates a very limited form of habeas corpus petition. People who have been granted asylum or permitted to enter the United States as refugees are not yet permanent resident aliens. They are entitled to seek adjustment as a lawful permanent resident once they have resided in the United States as a refugee or asylee for a period of one year.

tive review, only the person making a "special claim" may seek judicial review of the order of expedited removal.[183] Even when judicial review is granted, the statute limits the relief to an order of remand for a full administrative removal hearing.[184] The INS regulations have also added limited administrative review for persons making claims of United States citizenship.[185]

If the noncitizen is not a returning resident, asylee, or refugee, the statute does not provide for administrative or judicial review of the expedited removal order. However, noncitizens who wish to contest

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See INA § 209(b)(5). Section 242(e)(4) allows the petitioner to dispute the allegation of alienage. Perhaps, then, citizenship claims will also be heard in this habeas proceeding. Whether this type of habeas proceeding must include an evidentiary hearing is unclear. In 1905, the Supreme Court upheld the constitutionality of an exclusion act which insulated from judicial review the factual determinations of the inspecting administrative official. *See* United States v. Ju Toy, 198 U.S. 253 (1905) (This case is also discussed *supra* Part II.). Yet under the exclusion statute applicable at the time, the person claiming citizenship was allowed an opportunity to present witnesses and develop evidence before the administrative officer and the statute created an administrative appeal. The new statute and regulations do not afford an equal amount of administrative procedure. See *supra* note 181, for a discussion of the regulations and other issues concerning citizenship claims.

183. *See* INA § 242(e)(4)(B)

184. *See id.*

185. *See* 8 C.F.R. § 235.6. Under the regulations, a person making a claim of United States citizenship which is not verifiable by the admission officer will be referred to an immigration judge for a review of the expedited removal order. There is no further administrative review of the IJ determination that the person is not a citizen. People who wish to challenge the INS determination of citizenship in an expedited removal proceeding should file in federal district court using the provisions of the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* and habeas corpus jurisdiction under 28 U.S.C. § 2241. Prior to IIRAIRA, section 360 of the INA had not permitted a Declaratory Judgment challenge if the issue of citizenship arose in connection with "any exclusion proceeding." *But cf.* Rusk v. Cort, 369 U.S. 367 (1962) (allowing some claims of citizenship to be made in declaratory judgment proceedings notwithstanding the limits of section 360). The holding in *Rusk* also casts doubt on the continuing validity of *Ju Toy.*

In a "housekeeping" provision of IIRAIRA, directed at conforming the new term of "removal," Congress amended INA § 360 to refer to "removal" proceedings. INA § 360 does not refer to "expedited removal." Congress appears to have failed to realize that citizenship claims might be made in expedited removal proceedings. On its face, the limits of INA § 360 do not apply. The absence of discussion of citizenship claims in section 235 might be a basis to argue that citizenship claims must be heard in regular section 240 hearings; however, the INS disagrees and the interim regulations provide for an extraordinarily streamlined administrative process with review only before an IJ. *See* 8 C.F.R. § 235.3(b)(5)(iv). Further, section 360 seems to be specifically contradicted in section 242(b)(5), which provides for judicial review of citizenship claims in the court of appeals and if a fact finding hearing is required, for remand to the federal district court. *See* INA § 242(b)(5). *Cf.* Ng Fung Ho v. White, 259 U.S. 276 (1922) (judicial fact finding required for persons making a citizenship claim inside the U.S.). For excellent material on citizenship claims, see Gary Endelman, *How to Prevent Loss of Citizenship,* 89-11 to -12, IMMIGRATION BRIEFINGS (1989).

the officer's decision may be able to file for habeas corpus review.[186] The possibility of habeas review does not remove the practical difficulty of filing the habeas petition.[187]

Additionally, Congress limited challenges to the expedited removal system as a whole in section 242(e)(3) by providing that any challenge to the constitutionality of the system must be brought within sixty days of the implementation of the program.[188] A suit was filed by several

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186. In *Karnuth v. United States ex rel. Albro*, 279 U.S. 231 (1929), Preston Albro, an attorney from Buffalo, New York, filed a habeas petition on behalf of Mary Cook and Antonio Danelon. Both Cook and Danelon were lawfully domiciled in Canada. Cook was a citizen of the United Kingdom and Danelon of Italy. They sought daily admission to the United States as business visitors pursuant to the Immigration Act of 1924, 43 Stat. 153, § 3. This statute contained no express provision for judicial review of admission decisions. Although the petitioners had been crossing the border from the Canadian side of Niagra Falls to the New York side for some time, a border inspector refused their admission as nonimmigrant business visitors. *See Karnuth*, 279 U.S. at 234. The petitioners challenged the border inspector's decision. The petitioners filed a habeas petition in district court instead of appealing to the Secretary of Labor. The district court entertained the petition, despite the fact that the petitioners had failed to exhaust their administrative remedies (today, exhaustion would be required in most cases). The habeas petition was eventually appealed to the Supreme Court. Although the Court upheld the exclusion order, the Court reviewed the agency's interpretation of the immigration laws notwithstanding the habeas context. The Court also rejected the petitioners contention that they were business visitors as defined by the 1924 Immigration Act, § 3. *See id.* at 242-44. Many years later, the Supreme Court held that Congress could authorize exclusion without an administrative hearing or judicial review. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542-44 (1950). *Abro* is not mentioned in the *Knauff* decision. The 1961 amendments to the INA granted administrative and judicial review of an exclusion determination. *See* former INA § 106. In future challenges to expedited removal, it may be that *Knauff* will be limited to its national security context and that *Abro* will provide authority for habeas review of the admission decision. *But cf.* Meng Li v. Eddy, A97-231 CV (JKS) (D. Alaska July 2, 1997) (unpublished order) (finding that section 242 precluded all habeas challenges to expedited removal orders except for the limited provisions found in the statute). Meng Li had a valid B-1 visitor visa and was refused entry by the inspector on the ground that he did not believe she was entering the United States for a business trip. He ordered her removed for visa fraud or willful misrepresentation of fact. *See* INA § 212(a)(6)(C). She spent one month in detention while awaiting the outcome of the habeas petition. *See Jailed Beijing Woman Heading Home*, ANCHORAGE DAILY NEWS, July 3, 1997, at B-3. The denial of habeas relief is on appeal to the Ninth Circuit Court of Appeals. *See* Telephone interview with Margaret Stock, Esq., attorney for Meng Li (July 21, 1997).

187. *Albro* is an example of a habeas proceeding involving a third-party petitioner. *See* LIEBMAN & HERTZ, *supra* note 31, § 8.3 (discussing third-party petitioners in habeas corpus proceedings). *See also* United States *ex rel.* United States Lines v. Watkins, 170 F.2d 998 (2d Cir. 1948) (transportation company acted as petitioner for noncitizen). The INS is not uniformly granting attorneys access to noncitizens or putative citizens who are being detained pending their expedited removal. See Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647 (1997), for a discussion of detention and legal representation.

188. *See* INA § 242(e)(3)(A) and (B)

non-profit organizations even before the implementation.[189] It is possible that future claims might be barred as following outside the statute of limitations for the challenge.[190]

B. *Disfavored Claims*

1. *Claims for Discretionary Relief*

Section 242 attempts to remove judicial review of most claims for discretionary relief.[191] This is a very important limitation. I believe that the vast majority of cases involve review of the denial of discretionary relief.[192] The statute does preserve judicial review of claims

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189. AILA v. Reno, CA 97 CV 00597 (D.D.C. filed Mar. 27, 1997).

190. A similar time bar to litigation was included in section 307(b) of the Clean Air Act. That section provided:

> (1) A petition for review of action of the Administrator [regarding any emission standard] may be filed only in the United States Court of Appeals for the District of Columbia . . . . [Any such petition] shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise . . . .
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement . . . .

Notwithstanding this statutory bar, the Supreme Court allowed a limited form of review of the agency action in a criminal prosecution alleging a violation of an "emission standard." *See* Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978). Later, in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), the Supreme Court held that where an administrative finding would later be a critical element in a criminal prosecution, "there must be *some* meaningful review of the administrative proceeding." *Id.* at 837-38. These cases suggest that prosecutions for criminal re-entry after expedited removal may necessitate judicial review of the INS determination. It is beyond the scope of this article to consider avenues of judicial review of immigration decisions which may arise in subsequent criminal or civil proceedings.

191. *See* INA § 242(a)(2)(B)(ii).

192. I cannot provide detailed empirical evidence to support this claim. However, the Schuck and Wang study, *see supra* note 159, at 142, includes an analysis of immigration litigation in both the district courts and circuit courts from 1979 to 1990. This study indicates that 54% of the cases involved requests for relief from deportation. *See id.* at 144. A large percentage of these cases involved claims for political asylum. *See id.* IIRAIRA does not remove judicial review of most issues in political asylum cases. A search of the electronic databases of LEXIS and Westlaw revealed that 73% of the immigration cases for 1996 involved judicial review of the abuse of discretion in denying relief. These cases were found by conducting the same search used by Schuck and Wang, *see id.* at 126 n.55, and adding the following focus request: "abuse /s discretion /s deny or deni!."

The relief available under the immigration laws is often committed to the discretion of the agency. *See, e.g.*, INA § 240A (cancellation of removal). Daniel Kanstroom has carefully cataloged the types of discretionary decision making in the immigration laws. *See* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigra-*

that the INS improperly denied an application for political asylum.[193]

However, Congress may not have successfully eliminated all judicial review in these cases. Judicial review should be available to test the agency's interpretation of statutory eligibility for the relief. In many cases involving discretionary relief, the noncitizen must first establish prima facie eligibility for the relief. Only after this prima facie case is met does the agency exercise its discretion by deciding whether the noncitizen should receive the relief.[194] For example, if a noncitizen wishes to apply for Cancellation of Removal, the noncitizen must establish that she: (1) has been an alien lawfully admitted for permanent residence for not less than five years, (2) has resided in the United States continuously for seven years after having been admitted in any status, and (3) has not been convicted of any aggravated felony.[195] There are many cases where the noncitizen has disputed the INS's legal conclusion that he or she was statutorily ineligible to request the discretionary relief.[196]

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tion Law, 71 TUL. L. REV. 703, 767-71 (1997). Given the new congressional limits on judicial review, he calls on the agency to exercise self-restraint and to promulgate rules to limit and guide the exercise of discretion. *See id.* at 717, 805. *See also* Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861 (1994) (criticizing existing "discretion talk" as inappropriately determinate and suggesting that judicial review is essential to a dialogue that supports the development of law).

193. *See* INA § 242(a)(2)(B)(ii). There are specific limits on the scope of judicial review in the statute governing asylum claims. The statute also precludes judicial review of some of the issues concerning statutory eligibility to request asylum. *See id.* § 208(a)(3). *See also id.* § 208(d)(7) ("Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.").

194. The government appears to agree that the noncitizen may seek review of statutory eligibility. *See* Tefel v. INS, No. 97-0805-CIV-KING, 1997 WL 369980, at *42 (S.D. Fla. May 20, 1997). Although section 242(a)(2)(B) is not expressly discussed in the court's opinion, the government argued that noncitizens would be able to file petitions for review in the courts of appeal to challenge the agency's interpretation of statutory eligibility for discretionary relief.

Professor Kanstroom suggests that discretionary decision making would have much greater clarity if the two step process were labeled "interpretive discretion" when the agency is determining statutory eligibility and "delegated discretion" when the agency is determining whether the noncitizen should receive the relief. He explains that these labels would then guide the appropriate judicial deference afforded to the agency action. *See* Kanstroom, *supra* note 192, at 751-66. He also notes that in the absence of judicial review, these distinctions would also help Congress set standards for the proper exercise of discretion and that the agency through regulations should also clarify and cabin its own discretionary decision making. *See id.* at 805.

195. *See* INA § 240A(a). This statute replaces the former waiver for long-term residents found in former INA § 212(c).

196. *See, e.g.*, Yesil v. Reno, 958 F. Supp. 828 (S.D.N.Y. 1997) (challenging the INS definition of seven years of "lawful unrelinquished domicile" necessary to establish eligibility for former INA § 212(c) relief). *See also* LEGOMSKY, *supra* note 22, at 621-24 (additional arguments

The language of the statutory bar to judicial review is also imprecise. The statute provides that there shall be no judicial review of "any judgment regarding the granting of relief under [INA] section [212(h), 212(i), 240A, 240B, or 245]."[197] A possible construction of this provision would be that it bars judicial review only when the agency *grants* relief. The statute refers solely to decisions "regarding granting" relief. It says nothing about "denial." In another provision, the statute bars judicial review of decisions granting or denying relief.[198] Advocates will argue that this language demonstrates that Congress knew how to preclude all judicial review of claims denying relief.[199]

2. *Claims for Injunctive Relief*

In section 242(f), Congress sought to prevent injunctions which would limit the INS's implementation of the provisions of IIRAIRA. The statute states that no court, except the United States Supreme Court, may grant an injunction "to enjoin or restrain the operation of the provisions of part IV of this subchapter . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated."[200] Congress probably intended this provision to prevent class-wide injunctions such as those which have prevented the INS from removing large numbers of people or from implementing changes in the past.[201] Part IV of the subchapter of the amended INA covers inspection, apprehension, detention, and removal of aliens.[202] It does not cover subchapter I which contains provisions concerning the authority of officers, the implementation of regulations, and the operation of the Executive Office for Immigration Review. Litigants will argue that they seek to enjoin the implementation of the law or the regulations and not the particular statutory provision included in the subchapter.[203]

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limiting this bar to review).

197. INA § 242(a)(2)(B)(i).

198. *See, e.g., id.* § 212(h) ("No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this section."); § 208(a)(3) ("No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).").

199. This argument was made by Lucas Guttentag in *The 1996 Immigration Act: Federal Court Jurisdiction—Statutory Restrictions and Constitutional Rights*, 74 INTERPRETER RELEASES 245, 250 (Feb. 10, 1997).

200. INA § 242(f)(1).

201. *See* the discussion of the legalization litigation *supra* Part II.

202. Title II (now subchapter II) includes sections 231-44.

203. This argument was already successfully presented in *Tefel v. Reno*, No. 97-0805-CIV-KING, 1997 WL 369980 (S.D. Fla. May 20, 1997). *Tefel* is discussed more in Part IV.B.3.

This section also seeks to limit injunctive relief in individual cases by requiring that the noncitizen establish that his or her removal would be "prohibited as a matter of law."[204] The application of this subsection is unclear. It may have been meant as a guide to the court of appeals in granting discretionary stays of removal while a petition for review is pending. This subsection might also be used to argue that Congress anticipated continuing habeas corpus jurisdiction and wished to set standards for the granting of a stay of removal in that context. If this construction is correct, the articulated standard of proving an error of law is much broader than the government position that habeas review is limited to cases where removal would result in a "manifest injustice" or "substantial constitutional error."[205]

3. *The "Catch-All" Barriers*

Congress apparently created two subsections of section 242 as "catch-all barriers"[206] that would gather all other possible claims and either restrict or eliminate judicial review of these claims. The most important barrier is found in section 242(g):

> Exclusive Jurisdiction: Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

The effectiveness of this catch-all subsection will depend on the ability of lawyers to argue that the express provisions do not apply or that the provision is insufficient to eliminate other grants of jurisdic-

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Similar language was used in the former version of section 279 which had previously been used by litigants to assert federal court jurisdiction. In that statute, jurisdiction was available for decisions within Title II of the INA. Courts sometimes refused to exercise jurisdiction pursuant to section 279 and read it as a restraint on general federal question jurisdiction when the noncitizen was challenging an action or regulation governed by Title I (now subchapter I). *See, e.g.*, Yim Tong Chung v. Smith, 640 F. Supp. 1065, 1069 (S.D.N.Y. 1986) (finding review of denial of work authorization precluded because it was not within Title II of the INA); Chen Chaun-Fa v. Kiley, 459 F. Supp. 762 (S.D.N.Y. 1978) (finding jurisdiction of the court limited to Title II).

204. INA § 242(f)(2).

205. Part V provides a discussion of the types of claims and forms of habeas review which survive the 1996 legislation.

206. The "catch-all" appellation merely describes the probable intent of Congress, for as I will show, many types of claims will evade these barriers.

tion.[207] Congress does not clearly bar all judicial review because it uses language which itemizes the types of decisions covered by the bar. Therefore, it is not clear that this provision prohibits claims that do not arise in the context of removal or claims that do not directly concern the Attorney General's treatment of proceedings or removal orders against aliens.

The second subsection does not directly forbid judicial review but rather tries to gather all other permissible claims and channel them into review of the final order of deportation. Those noncitizens who have any express right to judicial review of the final order may file a petition for review in the court of appeals.[208] Section 242(b)(9) provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this chapter shall be available only in judicial review of a final order under this section.

This subsection was apparently meant to overturn the holdings in *Cheng Fan Kwok v. INS*[209] and *McNary v. Haitian Refugee Center*[210] and to follow the reasoning suggested in *Thunder Basin Coal Mining Co. v. Reich*.[211] These decisions allowed litigants to evade the "sole

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207. *See, e.g.*, Rodriguez v. Wallis, No. 96-3518-CIV-DAVIS (S.D. Fla. Jan. 29, 1997) (ruling that even if section 242(g) were effective at that time, bond determinations would be outside the scope of the actions covered by the subsection). *But cf.* Ramallo v. Reno, 114 F.3d 1210 (D.C. Cir. 1997) (finding that section 242(g) precludes jurisdiction under 28 U.S.C. § 1331 of claims that the Department of Justice breached agreement not to commence deportation proceedings but acknowledging that jurisdiction remains in habeas to consider "substantial" constitutional questions). *Ramallo* is discussed in the text beginning *infra* note 235.

208. *See* INA § 242. If the noncitizen is one of the people barred from judicial review, subsection 242(b)(9) does not appear to apply as the subsection assumes some form of judicial review.

209. 392 U.S. 206 (1968). *See supra* text accompanying notes 106-10.

210. 498 U.S. 479 (1991). *See supra* text accompanying notes 126-39.

211. 510 U.S. 200 (1994). In *Thunder Basin*, the plaintiff filed a pre-enforcement injunction against the Mine Safety and Health Administration ("MSHA"), alleging both statutory and constitutional violations if MSHA was allowed to enforce an administrative order. The Mine Act provided for administrative review before an independent commission and then a petition for review in the court of appeals. The Supreme Court found that Congress had intended to preclude pre-enforcement district court jurisdiction. The Court stated that "whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure and purpose, its legislative history, *Block* [*v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984)], and whether the claims can be afforded meaningful review." *Thunder Basin*, 510 U.S. at 207. The Court distinguished *McNary* by stating that the language of the INA "did not evi-

and exclusive" procedures set forth in former section 106. Asserting *Cheng Fan Kwok*, some litigants successfully characterized the nature of their district court action as outside the scope of a removal order and therefore not limited to the section 106 petition for review procedure.[212] Relying on *McNary*, federal district courts entertained challenges to INS enforcement practices when the allegations require a trial court and evidentiary hearings to develop an adequate record for review.[213] In

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dence an intent to preclude broad 'pattern and practice' challenges . . . and acknowledged that 'if not allowed to pursue their claims in the District Court, [litigants] would not as a practical matter be able to obtain meaningful judicial review.'" *Id.* at 213 (quoting *McNary*, 498 U.S. at 494, 496, 497).

212. The noncitizens usually asserted that the district court had jurisdiction based on the APA combined with general federal question jurisdiction. The Supreme Court has held that the APA lacks an express grant of jurisdiction. *See* Califano v. Sanders, 430 U.S. 99 (1977) (interpreting 5 U.S.C. § 703 and ultimately rejecting the assertion of jurisdiction as precluded by the Social Security Act). Federal question jurisdiction is found in 28 U.S.C. § 1331. The APA recognizes that Congress may also preempt agency action from APA judicial review. Where Congress appears to do this, courts usually read the preclusion statute as impliedly precluded jurisdiction under 28 U.S.C. § 1331. *See* 5 U.S.C. § 701(a)(1). *See generally* 2 KENNETH DAVIS ET AL., ADMINISTRATIVE LAW TREATISE § 11 (3d ed. 1997) (addressing judicial review of agency adjudications). Another exception to judicial review under the APA arises when the court finds that the decision has been completely committed to agency discretion and there is no meaningful standard of review to apply. *See* 5 U.S.C. § 701(a)(2). This exception is sometimes used in immigration cases challenging discretionary waivers such as waiver of the home residency requirement for certain exchange visitors (J-1 visas). *See, e.g.*, Korvah v. Brown, 66 F.3d 809 (6th Cir. 1995). See also the critique of similar reasoning in Nafziger, *supra* note 22.

213. *See, e.g.*, Campos v. Nail, 43 F.3d 1285 (9th Cir. 1994). *Campos* discusses the *McNary* exceptions to the section 106 review and distinguishes *Thunder Basin* on the ground that *McNary* allows district court jurisdiction over both statutory and constitutional claims which could not be developed in an individual case or required a factual record in a trial court. In *Campos*, the plaintiffs asserted that Immigration Judge Nail, who sat in Arizona and Nevada, had failed to exercise independently his discretion to grant change of venue requests for any Central American who had not established a residence in the United States prior to apprehension in Arizona or Nevada. The district court had ruled that the individual plaintiffs could not establish the factual record necessary to the resolution of their claims if they were only allowed to challenge Judge Nail's practice before the court of appeals in individual petitions for review. The Ninth Circuit agreed.

Not all noncitizens succeed in distinguishing *Thunder Basin*. In *Massieu v. Reno*, 91 F.3d 416 (3d Cir. 1996), the Third Circuit Court of Appeals overturned a district court's grant of jurisdiction where the noncitizen sought to enjoin the INS deportation proceedings. Mr. Massieu, the former Deputy Attorney General of Mexico, had fled after his resignation and allegations of criminal conduct. A few days after his arrival in the United States, the Mexican government charged Massieu with several crimes. The United States government brought four unsuccessful extradition proceedings. On the same day as the dismissal of the last extradition proceeding, the government commenced deportation proceedings. Massieu had alleged that the deportation proceedings were a sham for an "illegal de facto extradition" to Mexico. The INS alleged that Massieu was deportable under section 241(a)(4)(C)(i), which states "[a]n alien whose presence or activities in the United States the Secretary of State has reasonable grounds

cases that arose outside of the direct review of removal orders, litigants also used other grants of jurisdiction to seek mandamus and declaratory judgements.[214]

Litigants are likely to find a variety of ways to try to evade the strictures of section 242 due to these precedents. They will also rely on the long line of cases which hold that courts should narrowly construe statutes which seek to limit judicial review and, absent the express intent of Congress, should preserve review of constitutional challenges.[215] Congress may have thought that these catch-all barriers would

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to believe would have potentially serious adverse foreign policy consequences for the United States is deportable." INA § 241(a)(4)(C)(i). Massieu also sought to enjoin the deportation proceedings alleging, among other things, that section 241(a)(4)(C) was unconstitutional. The district court accepted jurisdiction, enjoined the deportation proceedings and found section 241(a)(4)(C) unconstitutional for three reasons: void for vagueness, a violation of due process as the Secretary of State's determination is allegedly unreviewable, and the provision is an unconstitutional delegation of power which lacks sufficiently intelligible standards to direct the Secretary's actions. *See* Massieu v. Reno, 915 F. Supp. 681, 711 (D.N.J. 1996). The Third Circuit reversed, stating that *Thunder Basin* required the Court to assess carefully the intent of Congress in delaying judicial review of administrative action. The Court found that Congress had meant to create an efficient and streamlined procedure which avoided unnecessary delay when it enacted former INA § 106 in 1961. The Third Circuit ruled that Massieu had failed to exhaust his administrative hearings and that his constitutional claims, unlike those in *McNary*, could be dealt with in the petition for review following the deportation hearing, notwithstanding the inability of the IJ or BIA to consider constitutional challenges to the statute. *See Massieu*, 91 F.3d at 422-23. The deportation hearing proceeded in the Spring of 1997, and in late May, the IJ ruled that Massieu was not deportable as charged because the government failed to meet its burden of proof. (Unpublished order). The Mexican government has reported that they will continue to seek his deportation. *See* Robert L. Jackson, *Mexico Official Caught Up in U.S. Legal Maze Crime*, L.A. TIMES, Aug. 4, 1997, at A14.

214. *See* 28 U.S.C. §§ 1651, 2201; Kummer v. Shultz, 578 F. Supp. 341 (N.D. Tex. 1984) (attempting to use mandamus to compel adjudication of an immigrant visa petition). In an unusual case, mandamus was used to prevent the INS from commencing a second deportation proceeding where the government was barred by res judicata principles. *See* Ramon-Sepulveda v. INS, 824 F.2d 749 (9th Cir. 1987) (mandamus relief granted to prevent INS from bringing new deportation proceedings based on assertion of a res judicata defense). In a case pending in federal district court, a Rwandan petitioner sought mandamus to compel the administrative adjudication of an asylum claim pending before an asylum officer for over twelve months. Among other claims, the petition alleges that the INS is intentionally delaying the adjudication of Rwandan asylum claims and thus impermissibly discriminating against Rwandan applicants on the basis of national origin. *See* Karani v. Reno, CV 97-619 (D.D.C. 1997); *see also* Lee J. Teran, *Obtaining Remedies for INS Misconduct*, 96-5 IMMIGRATION BRIEFINGS (May 1996) (discussing mandamus, the Federal Tort Claims Act, and other actions to remedy agency misconduct).

215. *See* Abbott Labs. v. Gardner, 387 U.S. 136 (1967). The *Abbott* opinion quotes a statement in *Rusk v. Cort*, a case concerning limits on the use of declaratory judgements to assert claims of citizenship: "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 141 (quoting Rusk v. Cort, 369 U.S. 367, 379-80 (1962)). Other famous cases also reflect the presumption of

demonstrate an intention to block judicial review, but as several recent cases illustrate, the attempt may have failed.[216]

In *Arab-American Anti-Discrimination Committee v. Reno*,[217] the government used section 242 to support its motion to dismiss a suit and injunction, alleging that the INS had been motivated to instigate deportation proceedings against eight members of the Popular Front for the Liberation of Palestine ("PFLP") engaged in activities protected by the First Amendment.[218] The case has a long history in the federal courts.[219] After the passage of IIRAIRA, the government moved to dismiss the suit, arguing that the recent amendments eliminated the federal court jurisdiction and the substantive claims of the litigants. In an unpublished order, the district court rejected the government's motion. The Ninth Circuit Court of Appeals affirmed the district court

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preserving judicial review, especially for constitutional questions. *See, e.g.*, Webster v. Doe, 486 U.S. 592 (1988) (continuing to consider constitutional allegations of denial of equal protection notwithstanding congressional statute, which insulated the actions of the Director of the CIA from judicial review); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) (interpreting statutory preclusion of judicial review of Medicare claims as not excluding judicial review of regulations promulgated under the Medicare statute); Johnson v. Robison, 415 U.S. 361 (1974) (notwithstanding statute precluding review of claims for veterans' benefits, jurisdiction remained to consider constitutional issues); *see also* Traynor v. Turnage, 485 U.S. 535 (1988) (notwithstanding statutory prohibition of all judicial review of Veterans Administration benefit rulings, statute did not preclude collateral statutory claim); Lindahl v. Office of Personnel Management, 470 U.S. 768, 791 (1985) (statute which made all disability determinations final, conclusive and not subject to review was not a bar to claims of departure from substantial procedural rights or claims of error "going to the heart of the administrative determination") (internal quotations omitted). *Cf.* Thunder Basin Coal Mining Co. v. Reich, 510 U.S. 200 (1994) (finding that statutory scheme reflected congressional intent to preclude preenforcement judicial review; discussed *supra* note 211).

216. This Article was completed in August 1997.

217. Nos. 96-55929, 97-55479, 1997 WL 395300 (9th Cir. 1997)

218. *See id.* at *1. Six of the noncitizens are lawful permanent residents and two were in lawful nonimmigrant status at the time that the deportation proceedings began. *See id.*

219. The INS began deportation proceedings in 1987, claiming that the members of the PFLP were deportable under current immigration laws for advocating communism. The eight members of the PFLP and a committee of United States citizens filed an action in federal district court claiming that this section of the Immigration Act was unconstitutional. These particular charges were subsequently dropped, leaving only charges based on certain technical visa violations. Later, the government once again initiated deportation proceedings, alleging "terrorist activity" against two of the members of the PFLP. In response, all eight members filed an action in federal district court, asserting general federal question jurisdiction, alleging that the INS had engaged in unlawful selective prosecution. After discovery and an evidentiary hearing, the district court enjoined the continuation of the deportation. The Ninth Circuit had affirmed the granting of the injunction in a 1995 opinion which held that noncitizens could assert First Amendment protections and that there was sufficient evidence that the INS had targeted the Palestinians for speech and associational activities to support the issuance of a preliminary injunction. *See id.* at *1-2.

order, finding that section 242(f) specifically granted jurisdiction to enjoin deportation (now removal) proceedings in cases where the proceeding was contrary to law.[220] The PFLP members had met this standard by proving that the government was motivated to commence the deportation proceedings by the First Amendment protected activities. In a careful analysis of section 242, Judge Nelson found that Congress must have meant to preserve federal court jurisdiction, given the presumption of the preservation of judicial review and the explicit exclusions from jurisdiction found elsewhere in section 242 and other provisions of IIRAIRA. She rejected the government's assertion that section 242(g) removes jurisdiction in cases denying commencement of removal proceedings because deportation proceedings had already begun when the federal court action was filed. She also ruled that the bar to jurisdiction in subsection (g) specifically preserved the grant of jurisdiction found in other parts of section 242 such as the provision of subsection (f), applicable in this case, which allowed injunctions in individual cases.

Judge Nelson also found that the catch-all consolidation subsection in section 242(b)(9) did not remove the district court's jurisdiction nor did it require the PFLP members to have to submit to a deportation hearing and administrative review before they could make their constitutional selective prosecution challenge. Judge Nelson concluded:

> Even if subsection (b)(9) applies along with subsection (g), we believe that subsection (f) must be incorporated as well, and that (f) must be read to preserve judicial review of constitutional claims such as the ones at issue here. Any other reading would present serious constitutional problems.[221]

Judge Nelson goes on to explain that some claims require factual proof which could not be established in the administrative proceedings nor developed on review in the court of appeals.[222]

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220. *See id.* at *4.

221. *Id.* at *5. The opinion is also following the well established maxim that courts should construe statutes to avoid constitutional doubts. *See, e.g.*, Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988).

222. *See id.* at *5-6. Judge Nelson notes that in IIRAIRA, Congress specifically forbids the remand to the agency or district court for the development of a factual record which was previously allowed under 28 U.S.C. § 2347(c). Thus, this change, which Congress probably meant to expedite judicial review under new section 242, may have created a basis for asserting alternative jurisdiction in the federal district courts. For a case which generally discusses remand under former INA § 106 using 28 U.S.C. § 2347(c), see *Makonnen v. INS*, 44 F.3d

The Ninth Circuit's interpretation of section 242 is an example of the ways in which courts read preclusion statutes to preserve their jurisdiction. This case suggests that other noncitizens may file federal district court actions seeking to enjoin removal proceedings where the noncitizen can establish selective prosecution or assert some other constitutional or statutory right which would render removal "contrary to law." Generally, the doctrine of exhaustion of administrative remedies would preclude preemptive suits, yet there are enough recognized exemptions to this doctrine[223] to suggest that litigants, especially those seeking to vindicate constitutional claims, may use this strategy to evade the limits on judicial review.

In *Tefel v. Reno*,[224] a class action including approximately 40,000 noncitizens,[225] Judge King found that the federal courts retain jurisdiction to issue an injunction restraining the INS from removing noncitizens.[226] The government argued that either subsection 242(f) or (g) eliminated the federal court jurisdiction. Although he found that section 242(f) was not applicable to actions filed before April 1, 1997, King also ruled that this provision did not apply where the noncitizens "seek to enjoin constitutional violations and policies and practices of the [INS] . . . . Rather than seeking to enjoin the statute, they are seeking its implementation under the appropriate standard."[227] The plaintiffs asserted that the BIA's decision that found that Congress meant to preclude retroactively applications for suspension of deporta-

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1378 (8th Cir. 1995).

223. Exhaustion is generally not required when agency precedent clearly indicates it is useless to exhaust, or when the party is asserting constitutional claims that the agency has no power to hear. *See, e.g.*, Farhoud v. INS, 114 F.3d 867, 869 (9th Cir. 1997) (exception to the exhaustion requirement for constitutional claim); Garberding v. INS, 30 F.3d 1187, 1188 n.1 (9th Cir. 1994) (willing to consider constitutional claims not raised before the BIA due to inability of BIA to consider equal protection challenge); Rashtabadi v. INS, 23 F.3d 1562, 1567 (9th Cir. 1994) (discussing the exception for most constitutional claims); El Rescate Legal Servs. v. Executive Office for Immigration Review, 959 F.2d 742, 746-47 (9th Cir. 1992) (exception to exhaustion for constitutional challenge to procedures raising due process issues).

224. No. 97-0805-CIV-KING, 1997 WL 369980 (S.D. Fla. May 20, 1997).

225. *See id.* at *5. A similar class action is pending in California. *See* Barahona v. Reno, CV No. C97-0895 CW (N.D. Cal. 1997). On March 28, 1997, in an unpublished order, Judge Wilken granted class certification and a preliminary injunction enjoining deportation of class members. The INS appealed this order to the Ninth Circuit Court of Appeals. The appeal is still pending as of July 1997.

226. *See Tefel*, 1997 WL 369980, at *5. The INS filed an appeal of Judge King's order but Attorney General Reno also appeared to wish to resolve the issue through other means. *See infra* note 230.

227. *Tefel*, 1997 WL 369980, at *6.

tion under former INA section 244 was violative of several constitutional rights. They argued that the INS should be estopped from applying this ruling to cases where noncitizens have relied on the availability of this relief in abandoning claims for political asylum or other forms of relief from deportation. The plaintiffs similarly argued that the removal of the relief constituted a denial of due process and equal protection. The government responded that the parties would have the ability to present constitutional and nonconstitutional claims as a part of their petition for review before the court of appeals.[228] The district court concluded that these types of claims require the development of a factual record which could not be created before the agency and would, therefore, not be reviewed as part of the administrative record before the court of appeals. "[R]equiring [the plaintiffs] to raise such claims only before the Court of Appeals is tantamount to denying Plaintiffs' a forum before which they can raise their constitutional claims."[229]

Judge King also rejected the government's argument that the plaintiffs had failed to exhaust their administrative remedies. He found that exhaustion would be futile because the BIA had issued an opinion which would definitively bar their applications for suspension of deportation.[230] Further, he found that exhaustion is not required where the party is challenging the constitutional implementation of the law, not

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228. *See id.* at *3. Inherent in the government's argument of continuing jurisdiction in the court of appeals is the assumption that noncitizens seeking to challenge their statutory eligibility for discretionary relief may continue to do so notwithstanding the bar on judicial review of decisions "regarding the granting" of relief. *See supra* Part IV.B.1.

229. *Tefel*, 1997 WL 369980, at *4.

230. The petitioners were seeking to overturn the BIA decision *Matter of NJB*, Int. Dec. 3309 (BIA 1997). In this case, the BIA held, in a 7-5 ruling, that pending cases would be bound by the new provisions in IIRAIRA that discontinued the practice of counting the time spent in deportation proceedings towards the minimum seven year residency requirement for suspension of deportation. On July 10, Janet Reno announced that she would review the BIA's decision. In doing so, Ms. Reno noted, "[w]e must recognize the special circumstances of individuals whose cases were pending when the new law was enacted, and avoid any unfairness that could come from applying new rules to pending cases. We want to ensure that [IIRAIRA] will not have an unduly harsh effect . . . ." Department of Justice News Release, *Administration Proposes Finetuning for 1996 Immigration Law to Mitigate Harsh Effects of Applying New Rules to Pending Cases*, 1997 WL 381828 (D.O.J. July 10, 1997). The Administration announced a legislative proposal which would essentially apply the old law on a case-by-case basis to applicants whose cases were pending prior to April 1, 1997. *See id.* at *1. The Attorney General vacated *Matter of NJB* on July 10, 1997, in a one paragraph order. One possible explanation of the administration's reaction may be that if *Tefel* or similar cases continued, noncitizens might have established some substantive due process rights to combat retroactive elimination of relief from deportation.

the particular outcome of any case.[231] Judge King also noted that the plaintiffs presented substantial evidence that many people would never be able to wait for judicial review of their administrative removal order because they would lack the funds to pursue an individual appeal. Judge King concluded that without representation in the class action, "these Plaintiffs will be denied any forum to raise their constitutional and statutory claims."[232]

Judge King also held that subsection (g), the catch-all barrier, applied to cases filed before April 1, 1997; however, he determined that the suit before him was not, in fact, within the "catch-all" barrier. He accepted two arguments presented by the plaintiffs. The plaintiffs argued that the plain language of subsection (g) only covered the actions of the "attorney general" and therefore did not cover decisions of the BIA or other subordinate officials.[233] Second, the plaintiffs relied on *McNary* to argue that section 242(g) could only preclude judicial review of those matters within the scope of a final order of removal and that it did not limit pattern and practice challenges which cannot be litigated as part of the administrative proceedings. They argued that a broader reading of section 242(g) would bar judicial review of any claim that was not part of the administrative order. Adopting the broader reading would render the statute unconstitutional as a violation of separation of powers. Judge King agreed that the statute must be interpreted based on the plain language of the provision and construed to avoid an abolition of federal court jurisdiction to present constitutional claims. "Although the Congress may define the jurisdiction of the federal courts, it may not intrude upon the judiciary's essential function by denying any judicial forum to a plaintiff who asserts a violation of constitutional rights."[234]

Not all litigants are successful in characterizing their claims as falling outside of the scope of section 242. In *Ramallo v. Reno*,[235] the Court of Appeals for the District of Columbia found that section 242(g) barred general federal question jurisdiction where a noncitizen tried to enjoin deportation proceedings. Ramallo sought to enforce an agreement with the INS in which the agency agreed not to enforce an out-

231. *See supra* note 223 (discussing the exceptions to the exhaustion requirement).

232. *Tefel*, 1997 WL 369980, at *5.

233. The INA contains the following definition: "'Attorney General' means the Attorney General of the United States." INA § 101(a)(5).

234. *Tefel*, 1997 WL 369980, at *4.

235. 114 F.3d 1210 (D.C. Cir. 1997).

standing order of deportation.[236] The district court granted specific performance of the oral agreement based on the theories of promissory and equitable estoppel.[237] The government appealed this decision, and during the appeal Congress enacted IIRAIRA.

The Court of Appeals for the District of Columbia rejected Ramallo's arguments that her lawsuit arose in a context which was outside of the intended bar of section 242(g).[238] Judge Edwards said that regardless of Ramallo's characterization of her claims, in essence, she sought to prevent the INS from executing an outstanding order of deportation. Given the express language of subsection (g), he ruled that neither the district court nor the court of appeals could entertain her suit. He noted that Ramallo was not precluded from all forms of judicial review and suggested that she could raise any substantial constitutional claims in the a writ of habeas corpus.[239]

Although Congress may have been intending the 1996 legislation to

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236. In 1986, Marlena Ramallo, a lawful permanent resident, was convicted of conspiracy to import cocaine. Following her conviction, the INS commenced deportation proceedings against her, and she sought a section 212(c) waiver. Before the deportation proceedings could conclude, Ramallo, the INS, and the Drug Enforcement Agency, entered into an agreement that in exchange for Ramallo's testimony against certain drug traffickers, the INS would not deport her. As part of the agreement, she withdrew her application for section 212(c) relief. As a result, a final order of deportation was entered against her. It was her understanding that the final order would be quashed at a later date. In recognition of her cooperation, the INS filed a motion to reopen the deportation proceedings on February 10, 1992 on Ramallo's behalf. The IJ granted the motion and set a deadline for the submission of a new section 212(c) application. Ramallo's counsel failed to submit the application on time and the IJ denied the application both for lack of prosecution and because the Judge found her to be statutorily ineligible for the relief because she had lost her permanent resident status in 1988 when the deportation order became final. Ramallo appealed the denial of the section 212(c) waiver to the BIA. The government reversed its earlier support of her application and moved to dismiss the appeal on the ground that Ramallo had traveled outside the United States subsequent to the entry of the final order of deportation, thereby executing the order and vacating all BIA jurisdiction to consider an appeal. The BIA granted the INS motion to dismiss the appeal on March 10, 1994 and Ramallo filed a timely petition for review with the Fourth Circuit Court of Appeals. Ramallo then moved to hold the petition for review in abeyance while the parties negotiated a settlement. Ultimately, settlement negotiations failed and she brought an action in the federal district court seeking specific performance of the INS promise not to deport. The INS began deportation proceedings seeking Ramallo's deportation as an aggravated felon. Ramallo filed an action in the federal district court seeking to enjoin the deportation proceedings. *See id.*

237. Questions were also raised as to the district court's jurisdiction under former INA § 106. The government argued that the court of appeals, and not the district court, had jurisdiction pursuant to section 106. The district court rejected this argument noting that the case did not involve a question as to the deportation; rather, it dealt with a contract dispute between Ramallo and the Government. *See* Ramallo v. Reno, 918 F. Supp. 11, 17-18 (D.C. Cir. 1996).

238. *See Ramallo*, 114 F.3d at 1213.

239. *See id.* at 1214 (citing Yang v. INS, 109 F.3d 1185 (7th Cir. 1997)).

limit judicial review of INS action, the reality is that the removal of express provisions in the INA will encourage litigants to reframe their claims to take advantage of alternative grants of jurisdiction. *Tefel* and *American-Arab Anti-Discrimination Committee* present examples of the types of challenges that focus on constitutional issues in an effort to distinguish the case from judicial review of a final order of removal. As Congress eliminates the forms of relief from removal and tightens the issues which may be appealed in the petition for review, litigants may resort to these pattern and practice or constitutional challenges to both the substantive and procedural provisions of the law. The same pattern of forcing the litigation into constitutional arenas also appears in those cases which seek judicial review of a final order via the writ of habeas corpus. The opinion in *Ramallo* illustrates this pressure to create a constitutional issue in habeas corpus review. In the next part, I will explore both statutory and constitutional habeas corpus as the most likely basis for judicial review of final removal orders. The impact of the constitutionalization of immigration litigation, both under habeas corpus and the pattern and practice litigation, is explored in Part VI.

V. BACK TO THE FUTURE: THE RETURN OF HABEAS CORPUS

To remove a person from the United States or to bar entry, the government must have actual or constructive custody over that person.[240] Consequently, noncitizens have used habeas corpus petitions to obtain judicial review of deportation and exclusion orders for over one hundred years. This section will discuss the statutory and constitutional sources of habeas corpus jurisdiction. It will also discuss the types of claims which a court may entertain as part of habeas review.[241] In the last part of this section, I explore some of the ways that Congress defeated its goal of streamlining judicial review by ignoring habeas corpus jurisdiction. Further, if the government succeeds in asserting that the scope of review in habeas corpus should be limited to "serious constitutional issues," Congress and the Executive will have created a system which may lead to the constitutionalization of immigration law.

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240. *See* discussion of custody requirement *infra* note 306.

241. For clarity and to mirror the more common judicial usage, I will use the phrase "scope of review" instead of the term "cognizable claims." The scope of review depends, in part, on whether the habeas petition is based on 28 U.S.C. § 2241 or whether it is a pure constitutional habeas. See the discussion of Constitutional habeas in the next section.

A. *Statutory Habeas Corpus in Immigration Cases*

Although Congress repealed the grant of habeas jurisdiction formerly found in INA section 106,[242] it did not alter the habeas corpus jurisdiction found in 28 U.S.C. § 2241.[243] Section 2241 grants jurisdiction to federal district courts to issue writs of habeas corpus for persons "in custody in violation of the Constitution or laws . . . of the United States" and for persons "in custody under or by color of the authority of the United States."[244] Section 2241 was the jurisdictional basis for judicial review in the earliest immigration cases and continued to be the principal method of testing the legality of immigration orders until the 1952 Act allowed declaratory judgment actions and APA review.[245] In an effort to remove declaratory judgments and to streamline review, Congress created former section 106 which moved most review to the courts of appeal but also created specific habeas corpus jurisdiction in the district courts.[246] Habeas corpus under section 106 was the only

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242. Former INA § 106(a)(10), which provided for habeas review of aliens "in custody," was modified in AEDPA § 440(a) and removed in IIRAIRA. Section 106 also provided for habeas corpus review of exclusion orders. Deportation orders were reviewed via petitions for review in the court of appeals. *See supra* text accompanying notes 99-102 (discussing former INA § 106). *See also infra* Chart 1 (depicting former INA § 106 review procedures).

243. The constitutional guarantee of the writ of habeas corpus is discussed below. In one instance, IIRAIRA creates a special form of habeas for lawful permanent residents and asylees who are challenging expedited removal under INA § 235. *See* INA § 242(e)(2). This provision is discussed in Part IV, *supra* text accompanying notes 179-84. Whether this limited habeas impliedly repeals the general grant of habeas under 28 U.S.C. § 2241 will have to be litigated. Given the precedents which found no implied repeal of section 2241 in other context, I believe it is unlikely that the statute is effective to limit the nature and scope of habeas relief. When section 106 created habeas review of exclusion orders, litigants often asserted both section 106 and 28 U.S.C. § 2241 jurisdiction. *See* GORDON ET AL., *supra* note 2, § 81.03. *See also* Mojica v. Reno, Nos. CV 97-1085, CV 97-1869, 1997 U.S. Dist. LEXIS 8959, at *77-103 (E.D.N.Y. July 11, 1997) (affirming habeas jurisdiction under 28 U.S.C. § 2241 and noting prior practice). The APA also mentions habeas corpus in its judicial review provisions, *see* 5 U.S.C. § 703, however, this may be a reference to habeas under 28 U.S.C. § 2241 as the APA does not independently confer jurisdiction. *See* discussion of APA jurisdiction *supra* note 212.

244. 28 U.S.C. § 2241(c). This statute also confers jurisdiction on circuit court judges in their individual capacity and to the Supreme Court. 28 U.S.C. § 2241(a) provides, "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."

245. *See* discussion of these cases *supra* Part II.

246. In 1961, Congress adopted former INA § 106. *See* discussion of this change in Part II. The 1961 amendments and legislative history are also discussed in *Continuing Dialogue*, *supra* note 26.

form of review for orders of exclusion, but habeas was also authorized, in addition to the petition for review, when the alien was taken into custody pursuant to an order of deportation.[247]

Nothing in AEDPA or IIRAIRA specifically amended 28 U.S.C. § 2241, nor does the legislative history indicate that Congress considered habeas under this statute.[248] The Supreme Court has rejected arguments that other provisions of AEDPA concerning federal habeas review of state criminal convictions were effective to impliedly restrict 28 U.S.C. § 2241.[249] Moreover, the Supreme Court has long read statutory limits on habeas corpus jurisdiction narrowly, refusing to find implied repeals of alternative avenues of habeas corpus jurisdiction.[250]

In AEDPA, Congress barred a class of noncitizens convicted of certain crimes from the forms of review previously available in § 106. The express language provided that final orders "shall not be subject to review by any court."[251] In the litigation concerning the effect of this provision, several courts of appeal found that although this bar did repeal the authority to hear a petition for review, some form of habeas corpus review remained.[252] In a few cases, the noncitizen sought habe-

247. *See* former INA §§ 106(b), 106(10). The government has argued that Congress repealed the authority for habeas in immigration cases under 28 U.S.C. § 2241 when it created section 106. There is no mention of general habeas statutes in INA, nor is there a clear discussion in the legislative history surrounding section 106, of how Congress thought section 106 would revise habeas review under 28 U.S.C. § 2241. *See supra* Part II. Some courts continued to use section 2241 with section 106 when exercising habeas review. *See* Mondragon v. Ilchert, 653 F.2d 1254 (9th Cir. 1980). See also the discussion in *Mojica v. Reno* of the 1961 legislative history and the government argument that 28 U.S.C. § 2241 was impliedly repealed at that time. *See Mojica*, 1997 U.S. Dist. LEXIS 8959, at *32-34.

248. Judge Weinstein, of the Eastern District of New York, makes similar findings in *Mojica*, "There was no mention of section 2241 of title 28 in AEDPA . . . . Neither the [IIRAIRA's] transitional rules, nor its permanent provisions, specifically address or amend the habeas jurisdiction of the district courts under section 2241 of title 28." *Mojica*, 1997 U.S. Dist. LEXIS 8959, at *85. "[T]here is nothing in either the text or history of the AEDPA or the [IIRAIRA] that specifically mentions section 2241, much less limits or repeals it." *Id.* at *101. *See also* discussion of prior congressional considerations of habeas limitation *infra* note 293.

249. *See* Lindh v. Murphy, 1997 U.S. LEXIS 3998 (June 23, 1997); Felker v. Turpin, 116 S. Ct. 2333, 2338 (1996) (Court held that under the well established "clear statement" rule, 28 U.S.C. § 2241 jurisdiction cannot be repealed by "implication").

250. *See, e.g., Ex Parte* Yerger, 75 U.S. 85, 105 (1868).

251. AEDPA § 440a.

252. The government argued that section 440a of AEDPA actually repealed 28 U.S.C. § 2241 and that only a limited form of constitutional habeas review remained. *See, e.g.*, Figueroa-Rubio v. INS, 108 F.3d 110 (8th Cir. 1997); Boston-Bollers v. INS, 106 F.3d 352 (11th Cir. 1997) (per curiam) (dismissing petition for review but referring to statutory habeas); Kolster v. INS, 101 F.3d 785 (1st Cir. 1996) (dismissing the petition for review, but finding some form of habeas review remains); Salazar-Haro v. INS, 95 F.3d 309 (3d Cir. 1996), *cert. denied*, 117

as review in the federal district court without attempting to file a petition for review in the court of appeals.[253] Thus the result of the language of AEDPA was not elimination of judicial review, but rather a shift of forum and form.[254]

The statutory preclusion in IIRAIRA is much broader than the AEDPA provision because of the language of section 242(g) which states: "Except as provided for in this section and notwithstanding any other provision of law" no court shall have jurisdiction to review final orders of removal.[255] In some cases, the government has argued that this phrase is meant to override or impliedly repeal the grant of jurisdiction in 28 U.S.C. § 2241, as well as other forms of federal court jurisdiction.[256] At the same time, the government maintains that the repeal of the statutory basis for habeas corpus is not a violation of the suspension clause of the Constitution[257] because some form of limited

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S. Ct. 1842 (1997); Hincapie-Nieto v. INS, 92 F.3d 27 (2d Cir. 1996) (dismissing petition for review and referring to jurisdiction under 28 U.S.C. § 2241); Duldulao v. INS, 90 F.3d 396 (9th Cir. 1996) (dismissing petition for review and acknowledging statutory habeas); Medez-Rosas v. INS, 87 F.3d 672 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 694 (1997). I am one of the law professors who joined in filing an amicus brief in *Duldulao* when it was before the Ninth Circuit. Following the Ninth Circuit decision dismissing his petition for review, Mr. Duldulao sought habeas review in the federal district court in Hawaii. *See* Duldulao v. Reno, 958 F. Supp. 476 (D. Haw. 1997) (allowing habeas under 28 U.S.C. § 2241, but limiting the scope of review available to "grave constitutional claims" and denying the petition).

253. Some cases were filed directly in the district courts pursuant to 28 U.S.C. § 2241. *See, e.g.*, Eltayeb v. Ingham, 950 F. Supp. 95 (S.D.N.Y. 1997); Mbiya v. INS, 930 F. Supp. 609 (N.D. Ga. 1996). *See also* Vakalala v. Schiltgen, 1997 U.S. Dist LEXIS 2101 (N.D. Cal. Feb. 26, 1997).

254. In some cases, the government argued that the court of appeals, rather than the district courts, should exercise this limited habeas review in order to preserve the intent of Congress to streamline judicial review. *See, e.g.*, Yesil v. Reno, 958 F. Supp. 828, 836 (S.D.N.Y. 1997) (rejecting the government's argument in light of the Second Circuit's dismissals of petitions for review under AEDPA). The issue of the appropriate forum for habeas review is pending before the Ninth Circuit Court of Appeals in a consolidated petition for review and appeal from a denial of the writ of habeas corpus in *Magaña-Pizano v. Sonchik*, Nos. 97-15676 and 97-70384 (9th Cir. 1997). I am one of the law professors who joined in filing an amicus brief in these consolidated appeals.

255. The full text of section 242(g) is found in Part IV.B.3 *supra*.

256. *See, e.g.*, Mojica v. Reno, Nos. CV 97-1085, CV 97-1869, 1997 U.S. Dist. LEXIS 8959, at *78-86 (E.D.N.Y. June 24, 1997) and cases *supra* note 252. The government has also argued that statutory habeas under 28 U.S.C. § 2241 remains, but asserted that the scope of review is limited to a constitutional minimum. *See, e.g.*, Vakalala v. Schiltgen, No. C-97-042 SI, 1997 U.S. Dist. LEXIS 2101, at *10 (N.D. Cal. Feb. 26, 1997) (government argued that assuming section 2241 continues, the petitioners' claims were not within the residual constitutional habeas function); Moore v. District Dir., 956 F. Supp. 878, 882 (D. Neb. 1997) (INS conceded that district court maintained habeas jurisdiction under 28 U.S.C. § 2241 to extent required by the Constitution).

257. U.S. CONST. art. I, § 9, cl. 2, provides that the writ of habeas corpus shall not be sus-

constitutional habeas continues to exist.[258]

Putting aside the argument of a complete repeal of statutory habeas which will be explored in the next section, the next question is what is the scope of the review authorized by the statute. The litigation to date and the general history of habeas corpus review suggest that precision in defining the scope of habeas corpus will be unattainable.[259] As I have discussed, habeas corpus under 28 U.S.C. § 2241 was the vehicle for judicial review of immigration orders until Congress created the petition for review process in 1961. Habeas corpus was clearly used to mount constitutional challenges to the substantive immigration laws and to the procedures used in implementing the statutes.[260] But habeas was not solely limited to constitutional challenges. Habeas was also used to review the agency's statutory interpretation,[261] to review whether the agency failed to exercise discretion granted under the statutes,[262] and to review claims challenging the evidence presented in the administrative hearing.[263]

The federal district courts that have heard habeas corpus petitions following the passage of AEDPA and IIRAIRA reflect the difficulty in determining the exact scope of review under 28 U.S.C. § 2241. Some district courts have felt compelled to construe statutory habeas very narrowly in order to preserve the intent of Congress to generally limit

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pended except where "in Cases of Rebellion or Invasion the Public Safety may require it."

258. *See* Yang v. INS, 109 F.3d 1185 (7th Cir. 1997). In *Yang*, Judge Easterbrook agreed with this construction of IIRAIRA and wrote that "effective April 1, 1997, [section 306(a) of IIRAIRA] abolishes even review under § 2241, leaving only the constitutional writ unaided by statute." *Id.* at 1195. *See also* Kolster v. INS, 101 F.3d 785, 790 n.4 (1st Cir. 1996) (suggesting a "free standing" authority to hear constitutional habeas claims). This view of continuing habeas corpus jurisdiction is discussed in the next Part.

259. *See* HART & WECHSLER, *supra* note 11, at 1487-1505 (discussing judicial and scholarly debates about the historical role of habeas corpus). One author, in trying to determine the types of issues which might be considered in habeas corpus review of military courts martial, commented that beyond constitutional issues and issues of pure jurisdiction "lies fog." *See* D. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 874 (3d ed. 1982). Professor Fallon uses the confusion and possible limitations inherent in habeas corpus review to support his argument that appellate review of administrative agencies is the best vehicle to protect judicial review and separation of powers values. *See* Fallon, *supra* note 18, at 967-70.

260. *See* Yamataya v. Fisher, 189 U.S. 86 (1903) (hearing challenges to the grant of plenary power to the inspection officer in the 1891 Immigration Act).

261. *See* cases discussed *supra* note 54.

262. *See* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954) (habeas review of alleged failure to exercise discretion). *Cf.* Shaughnessy v. United States *ex rel.* Accardi, 349 U.S. 280 (1955) (accepting refusal to grant relief from deportation based on finding that BIA had exercised discretion).

263. *See* cases and authorities cited *supra* note 55.

judicial review in the type of immigration cases before them. For example, some courts refuse to use 28 U.S.C. § 2241 where the noncitizen seeks to review some other agency action such as the denial of a stay of deportation while a motion to reopen is adjudicated by the BIA. Under the prior section 106(a)(10), noncitizens often filed a habeas petition and sought a stay of the order of deportation while the agency adjudicated a motion to reopen. These courts read the elimination of the special form of habeas in former section 106 as evidence of the intent of Congress to limit habeas availability.[264] These courts are drawing a distinction between review of a final order and review of stays pending adjudication of a discretionary motion or action. The courts rejecting habeas jurisdiction apparently believe that the repeal of section 106(a)(10) ended habeas jurisdiction, or that they must read 28 U.S.C. § 2241 restrictively to fulfill congressional intent to avoid delay in the execution of removal orders.[265]

The federal district courts do not appear to dispute that habeas can be used to review a final order of deportation, but they disagree on what claims may be heard in those petitions. Some opinions have concluded that even under statutory habeas, the court can only consider

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264. *See, e.g.*, Lalani v. Perryman, 105 F.3d 334, 336 (7th Cir. 1997) (finding federal district courts had the authority to issue habeas corpus stays in this situation but noting that when section 242(g) became effective on April 1, 1997, it would eliminate the basis for the court's jurisdiction); Vayspitter v. United States Attorney Gen., 1997 WL 299372, at *3 (E.D. La. June 3, 1997) (section 242(g) divested the court of jurisdiction to review the execution of deportation orders by the Attorney General); Fedossov v. Perryman, 969 F. Supp. 26, 29 (N.D. Ill. 1997) (finding that section 242(g) barred habeas review of the district director's denial of a stay of execution); Benziane v. United States, 960 F. Supp. 238, 240 (D. Colo. 1997) (finding section 242(g) eliminates federal court jurisdiction to issue a stay of deportation and habeas under 28 U.S.C. § 2241 and would only allow a stay where petitioner challenges the underlying deportation order). *Cf.* Ugwoezuono v. Schiltgen, 1997 WL 142804, at *1 (N.D. Cal. Mar. 19, 1997) (upon order of the Ninth Circuit vacating prior refusal to grant habeas, accepted habeas to review denial of stay of deportation).

265. *See* cases *supra* note 264. The immigration statutes no longer remove federal court jurisdiction when the noncitizen leaves the country or is removed by the INS. As a result, the noncitizen could theoretically file a petition for review regarding the denial of a motion to reopen or of some other action even if the order is executed. This assumption presumes that the noncitizen is not otherwise barred under section 242 from filing a petition for review and that the motion is not vacated by departure. The current agency regulations continue to vacate motions to reopen or reconsider when the noncitizen departs the United States or is removed by the INS. *See* 8 C.F.R. § 3.2 (1997).

Denial of a motion to reopen has been held to create an independent right to file a petition for review because the denial constitutes a new final order. *See* Giova v. Rosenberg, 379 U.S. 18 (1964). The IJ or BIA has discretion to grant motions to reopen. *See* INS v. Jong Ha Wang, 450 U.S. 139 (1981). *See also* United States v. Rios-Pineda, 471 U.S. 444, 451-52 (1985) (denial of a motion to reopen is based on abuse of discretion, not de novo review).

challenges which articulate a "grave constitutional error or a fundamental miscarriage of justice."[266] Other courts have adopted a similar standard, requiring the articulation of a "substantial constitutional issue,"[267] while other courts have adopted a standard from criminal law habeas jurisprudence, finding that review is limited to whether the execution of the removal order would constitute a "manifest injustice."[268] As of July 1997, only one district court opinion has stated that statutory habeas is not limited and covers a broad array of legal issues.[269]

At first glance, it might seem that these narrow constructions of habeas review would achieve the congressional goal of streamlining or curtailing judicial review. However, certain habeas decisions reflect a broader type of review taking place under the label of restrictive review. For example, in *Eltayeb v. Ingham*,[270] the district court announced that habeas review after AEDPA was limited to determining whether the deportation would result in a miscarriage of justice. The court then reviewed the allegation of the alien that the INS had erroneously denied his request for a motion to reopen.[271] The district court concluded that the petitioner had failed to show that the denial of the motion to reopen was abusive and therefore had not presented a case where deportation would constitute a miscarriage of justice.[272] Thus

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266. *See, e.g.*, Vakalala v. Schiltgen, No. C-97-0492 SI, 1997 U.S. Dist. LEXIS 2101, at *11 (N.D. Cal. Feb. 26, 1997) (grave constitutional error or fundamental miscarriage of justice); Duldulao v. Reno, 958 F. Supp. 476, 479 (D. Haw. 1997) (same); Powell v. Jennifer, 937 F. Supp. 1245, 1252-53 (E.D. Mich. 1996) (same).

The apparent origin of the "fundamental miscarriage of justice" standard is *Hill v. United States*, 368 U.S. 424 (1962). *Hill* concerned federal post conviction relief under 28 U.S.C. § 2255 and required that the petitioner prove that the violation of a nonjurisdictional federal statute or rule in federal criminal conviction created a "fundamental defect which inherently results in a complete miscarriage of justice . . . ." *Id.* at 428. The standard is misapplied in habeas review of administrative action where there has been no judicial process or review.

267. *See* Fernandez v. INS, 113 F.3d 1151, 1155 (10th Cir. 1997) (habeas review remains for substantial constitutional errors); Ozoanya v. Reno, 968 F. Supp. 1, 7 (D.D.C. 1997) (substantial constitutional claims).

268. *See* Eltayeb v. Ingham, 950 F. Supp 95, 100 (S.D.N.Y. 1997); *see also* Mbyia v. INS, 930 F. Supp. 609, 612 (N.D. Ga. 1996); Note, *The Constitutional Requirement of Judicial Review for Administrative Deportation Decisions*, 110 HARV. L. REV. 1850, 1859-62 (1997) (critiquing *Mbyia* as applying an inappropriate scope of review).

269. *See* Mojica v. Reno, Nos. CV 97-1085, CV 97-1869, 1997 U.S. Dist. LEXIS 8959, at *100-03 (E.D.N.Y. June 24, 1997).

270. 950 F. Supp. 95 (S.D.N.Y. 1997).

271. This type of question would have previously been heard in a petition for review and the court of appeals would have determined if the denial of the motion was an abuse of discretion. *See* discussion of motions to reopen as new final orders *supra* note 265.

272. *See Eltayeb*, 950 F. Supp. at 100.

habeas review appeared to mirror both the scope and standard of review which might have occurred via a petition for review.

Yesil v. Reno[273] presented another case where the district court judge considered what type of claims might be presented in a statutory habeas petition after the passage of AEDPA. Mr. Yesil alleged that the agency had erroneously interpreted his statutory eligibility for a discretionary waiver of deportation. Judge Chin of the Southern District of New York found that he did not have to decide the exact nature of habeas corpus review under 28 U.S.C. § 2241 and whether it allowed review of statutory interpretation because the allegation of an erroneous statutory violation depriving a long-term resident of any possibility of relief from deportation could constitute a due process violation. Therefore, Mr. Yesil had presented a constitutional claim which clearly supported statutory habeas corpus jurisdiction.[274]

In contrast, Judge Weinstein, of the Eastern District of New York, found that statutory habeas under 28 U.S.C. § 2241 is not limited to pure constitutional issues but may be used to challenge the agency's interpretation of statutes. In *Mojica v. Reno*,[275] the petitioners sought review of the Attorney General's opinion in *Matter of Soriano*,[276] which

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273. 958 F. Supp. 828 (S.D.N.Y. 1997).

274. *See id.* at 839. As this Article was nearing completion, Judge Chin issued a second order denying the government's motion to reconsider. The government had asked him to reconsider his finding that Mr. Yesil should be allowed to apply for section 212(c) relief given the Attorney General's opinion in *Matter of Soriano*, slip op. Att'y Gen., 1997 WL 159795 (Feb. 21, 1997). Judge Chin found that the Attorney General had improperly interpreted AEDPA as requiring retroactive application of the bar to section 212(c) relief. Further, he found that even if the provision were meant to apply retroactively, "it would be manifestly unjust to apply" the bar to Yesil. *See* Yesil v. Reno, No. 96 CIV 8409, 1997 WL 394945, at *29 (S.D.N.Y. July 15, 1997). "[F]airness requires that Yesil be returned to the position he would have been in had the law properly been applied by the IJ and BIA." *Id.*

275. Nos. CV 97-1085, CV 97-1869, 1997 U.S. Dist. LEXIS 8959 (E.D.N.Y. June 24, 1997). *Mojica* involves review of the habeas petitions of two noncitizens, both long term permanent residents of the United States.

276. Slip op. Att'y Gen., 1997 WL 159795 (Feb. 21, 1997) (reversing the vacated decision by the BIA, Int. Dec. 3289 (BIA 1996)). The Attorney General concluded that imposing the new limits on § 212(c) relief to pending cases would not have an impermissible retroactive effect in violation of the Supreme Court's analysis in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). In that case, the Supreme Court set forth a test to determine impermissible retroactive effect in statutes that have no express effective date. Courts must first consider whether the application would impair rights a party possessed when she acted, increase liability for past conduct, or impose new duties with respect to transactions already completed. *See id.* at 280. The Attorney General concluded that retroactive loss of the possibility of a section 212(c) waiver did not alter the consequences of the noncitizen's behavior. The mere possibility of relief from deportation did not impair a right, increase liability, or impose new duties. *See Matter of Soriano, supra*, at *6. Some federal courts have agreed with the retroactive applica-

held that the elimination of section 212(c) relief in AEDPA was meant to apply retroactively to pending cases. In addition to this statutory issue, the petitioners raised several constitutional challenges to the Attorney General's decision and to the elimination of judicial review. Judge Weinstein found that he had jurisdiction to consider the statutory issues and did not address the additional constitutional challenges.[277]

Judge Weinstein rejected the government's arguments that the scope of habeas review under 28 U.S.C. § 2241 could be limited by "accommodation" to congressional policy goals.[278] "Fidelity to *Felker* and *Yerger* and the requirements of the clear statement rule militates against reading such limitations into the scope of section 2241. By its terms, section 2241 is not limited to constitutional claims or claims of fundamental miscarriage of justice."[279]

After determining that he could review the statutory claim under section 2241, Judge Weinstein rejected the Attorney General's decision in *Soriano*.[280] He also refused to accord her interpretation of the statute any deference because he found that the statute was unambiguous and that her opinion was based on her application of *Landgraf* and other judicial precedents rather than an interpretation of an ambiguous provision of the statute authority delegated to her.[281] After discussing the serious consequences of criminal convictions for noncitizens and the possible reliance noncitizens in the criminal justice system may have placed in the availability of a waiver of deportation, he concluded that

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tion. *See, e.g.*, Vargas v. Reno, 966 F. Supp. 1537 (S.D. Cal. 1997) (applying AEDPA bar to alien convicted of drug possession before enactment).

277. Although *Mojica* appears to have been resolved on statutory grounds, Judge Weinstein provides a detailed analysis of the international law and constitutional law background:

> In construing a statute courts approach their task with the assumption that Congress and the President acted with sensitivity to the fundamental thrust of our history as one of the world's foremost proponents of the rule of law and human rights, including fairness to all within our borders. It is therefore appropriate when deciding the meaning of the important new statutes dealing with legal permanent residents to put these provisions in their historical and constitutional setting.

Mojica, 1997 U.S. Dist. LEXIS 8959, at *28. Unlike other courts, Judge Weinstein appears to be expressly acknowledging the constitutional (and international human rights) norms which inform his reading of the immigration statute. *See id.* at *3-4. *See generally* Motomura, *Phantom Constitutional Norms*, *supra* note 9.

278. *See Mojica*, 1997 U.S. Dist. LEXIS 8959, at *101.

279. *Id.*

280. *See id.* at *169. Judge Weinstein also found that her opinion lacked legal support and had not articulated a rational basis for the retroactive application. He did not reach the issue of whether the Attorney General had the statutory authority to overturn the BIA decision. *See id.*

281. *See id.* at *165-68.

Congress did not make the section 212(c) bar retroactive. "It is not for the Attorney General to usurp Congress's obligation to think seriously about whether any national interest is served in the upsetting of past law including the past bargains that underlie the criminal justice system and international concerns."[282]

The government may continue to argue that the provisions of IIRAIRA intend to restrict judicial review to the constitutional minimum. As has been noted, Judge Easterbrook of the Seventh Circuit Court of Appeals accepted this reading and suggested that the language of section 242(g) has impliedly repealed 28 U.S.C. § 2241 for review of immigration orders.[283] The next section considers some of the jurisdictional and functional issues concerning constitutional habeas corpus.

B. *Constitutional Habeas Corpus*

If the 1996 immigration legislation did repeal the statutory form of habeas corpus in 28 U.S.C. § 2241, is there any basis for federal court habeas jurisdiction?[284] The Constitution does not expressly provide a grant of jurisdiction to hear habeas petitions; rather, the Constitution preserves access to habeas corpus in the Suspension Clause.[285] The exact nature of the writ of habeas corpus preserved by the Suspension Clause itself is debated.[286] Some interpreters of the Constitution will

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282. *Id.* at *168. *See* the continued discussion of constitutional implications *infra* Part VI and text accompanying notes 356-59.

283. *See* Yang v. INS, 109 F.3d 1185 (7th Cir. 1997).

284. This issue may also become important if Congress explicitly repeals 28 U.S.C. § 2241 in future immigration statutes.

285. *See* U.S. CONST. art. I, § 9, cl. 2. The writ of habeas corpus shall not be suspended except where "in Cases of Rebellion or Invasion the Public Safety may require it."

286. The respected immigration law treatise, IMMIGRATION LAW AND PROCEDURE, notes

> [m]ost of the time it has not been important to distinguish between statutory and constitutional habeas corpus: habeas corpus has generally conformed to the outlines established in the general federal habeas corpus statute. But some proposals for immigration reform, including a bill that passed the Senate in 1983, would have limited the writ in deportation and exclusion cases to its minimum content "under the Constitution.

3 GORDON ET AL., *supra* note 2, § 81.04 (footnote omitted) (specifying that content would not be easy) (citing to S. 529, 98th Cong., 1st Sess., 129 CONG. REC. 56970 (1983)).

Professor Legomsky briefly considered the question of the suspension clause limits on habeas corpus jurisdiction in his comprehensive article concerning judicial review of immigration cases: "That question is difficult enough to answer in the abstract. The history of constitutional prohibition is sparse, and the existence of a broadly construed federal habeas statute has enabled the Supreme Court to avoid the constitutional issue." *Forum Choices*, *supra* note 114, at 1342 (footnotes omitted).

argue that the Suspension Clause only protects the type of common law writ of habeas corpus available in 1789 when the Constitution was adopted.[287] Others may look to the Supreme Court's discussions of the history of the writ of habeas corpus and the prior periods when Congress limited federal court jurisdiction and the ability of federal courts to exercise the writ.[288]

The Supreme Court hinted at a distinction between statutory and constitutionally minimal habeas corpus review in *Heikkila v. Barber*.[289] In that opinion, Justice Clark found that in several immigration laws, Congress had intended to preclude judicial review "to the fullest extent permitted under the Constitution," yet federal courts continued to review the legality of deportation and exclusion orders in habeas corpus proceedings because of the constitutional guarantee of habeas corpus.[290]

Congress has struggled to understand the distinction between statu-

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287. *See* HART & WECHSLER, *supra* note 11, at 1465-77 (discussing development of the writ of habeas corpus); LIEBMAN & HERTZ, *supra* note 31, at ch. 2. *See also, Developments in the Law Federal Habeas Corpus*, *supra* note 31. Even if a narrow view of habeas is accepted, it may be very difficult to describe the scope and application of the writ. Historical interpretations will undoubtedly vary. *See generally* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS & IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

288. Judicial debates about the meaning of constitutional habeas corpus are also common. *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963) (debate between Brennan and Harlan over the historical development of the writ of habeas corpus to review state criminal convictions). The debate is excerpted in HART & WECHSLER, *supra* note 11, at 1488-97. Scholarly criticism of the Supreme Court legal history appears in Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965), and Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451 (1966). *Cf.* Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982).

One district court has already concluded that the only form of habeas which survives is the type of writ which existed at the time of the Constitutional Convention. *See* Charan v. Schiltgen, No. C 96-3061 FMS, 1997 WL 135938 (N.D. Cal. Mar. 18, 1997). In this opinion, Judge Smith finds that IIRAIRA removed jurisdiction to hear habeas under any federal statute and thus only the form of habeas protected by the Suspension Clause of the Constitution remains available. He concluded that this constitutional form of habeas only allows the federal court to inquire whether the INS has custody pursuant to an order issued by the proper jurisdictional body. This form of habeas would not allow the district court to correct any action of the INS even if it was based on errors of law or fact. *See id.* at *4. Judge Smith appears to disregard the Supreme Court debates referenced above that have often resulted in a broader reading of the common law writ of habeas corpus.

289. 345 U.S. 229 (1953) (considering the availability of habeas corpus review for aliens facing exclusion or deportation).

290. *Id.* at 235 (aliens historically have been able to "attack a deportation order" by habeas corpus).

tory and constitutional habeas corpus review in prior years when they considered proposed statutory reforms of judicial review. The 1961 creation of section 106, with its provisions for appellate court review and a separate guarantee of habeas corpus review,[291] appears to have been motivated by concerns that eliminating habeas corpus would be unconstitutional.[292] In the early 1980s, Congress considered reforms of section 106 which would have limited habeas to the "constitutional minimum."[293] The congressional hearings indicate a grave concern that the elimination of habeas corpus review would not withstand judicial scrutiny.[294] Ultimately the IRCA did not contain any significant alternations to judicial review.[295] In contrast, there is no record of congressional consideration of the possible role of habeas corpus jurisdiction

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291. In 1961, former INA § 106 was created. This section specifically referred to habeas corpus as the form of review for exclusion orders and whenever an alien was in the custody of the INS. Under the former statute, an alien in deportation proceedings could file a petition for review. If she lost that petition, she could file a writ of habeas corpus once the INS moved to execute the final order of deportation. In cases where the alien did not have a stay of deportation, the writ of habeas corpus was filed under section 106(a)(10) to prevent the removal of the aiien even while the petition for review was awaiting adjudication.

292. *See Continuing Dialogue*, *supra* note 26.

293. Several different restrictive formulations were proposed in various Senate bills between 1982 and 1984. Some proposals limited judicial review of exclusion orders to "the right of habeas corpus under the Constitution of the United States." *See* S. 2222, § 123(b), as analyzed in S. REP. NO. 97-485, at 35 (1982). The Senate bill introduced in the 98th Congress also included this provision. *See* S. 529, 98th Cong. (1983). At the same time, the House bills made statutory review in the court of appeals the "sole and exclusive procedures" for exclusion cases. This would have made the review procedure identical for both exclusion and deportation cases. *See* H.R. 1510.

In hearings on S. 529 before the judiciary committee, David Martin, then a professor at the University of Virginia law school and currently INS general counsel, testified that the phrase "under the constitution" is a "delphic phrase," but he admired the Senate's "boldness" for incorporating the phrase directly in the legislation. *See Immigration Reform and Control Act: Hearings on S. 529 Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess., at 331 (1983) (statement of David Martin, then Professor at the University of Virginia Law School) [hereinafter "*March 1983 Senate Hearings on S. 529*"]. Professor Martin also testified that the scope of review required "under the Constitution" was clarified by the Senate Committee Report which stated that habeas could be used to examine only questions of procedural due process which were fundamentally and clearly prejudicial to the noncitizen. *See* S. REP. NO. 97-485, *supra*, at 13-14.

See also GORDON ET AL., *supra* note 2, § 81.04. These proposed limits are discussed in ALEINIKOFF ET AL., *supra* note 36, at ch. I.

294. Several prominent immigration lawyers and scholars testified about the consequences of the limits on judicial review and the likely revival of habeas corpus review. *See, e.g., March 1983 Senate Hearings on S. 529*, *supra* note 293, at 345 (testimony of David Carliner on behalf of the ABA).

295. The Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986), was enacted after nearly ten years of reform proposals.

when it adopted the sweeping limitations in the 1996 legislation.[296]

Notwithstanding the lack of evidence of current legislative intent and the evidence of past legislative concerns and the historical use of habeas corpus in immigration cases, the government has continued to argue that the catch-all language in section 242(g) effectively eliminates the statutory right to a writ of habeas corpus and that habeas is limited to its constitutional minimum.[297] In *Yang v. INS*, Judge Easterbrook of the Seventh Circuit seemed to have no difficulty in defining the types of justiciable claims which are not available under the constitutional writ of habeas corpus. He wrote that noncitizens could not assert claims solely challenging statutory or regulatory interpretations, nor could a noncitizen seek review of discretionary actions.[298] His opinion acknowledged that procedural due process challenges would be included in constitutional habeas review.[299]

If Judge Easterbrook is correct,[300] what are the implications of this interpretation? Litigants will be compelled to characterize their claims as constitutional claims, and courts will exercise habeas corpus jurisdiction if only to determine that the claim is not of constitutional mag-

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296. The Congressional Record does not reveal a discussion of habeas corpus in immigration cases during the consideration of the 1996 legislation. The only mention I found was in the explanation of the Administration's proposed reform bill which would have substituted the petition for review to the court of appeals for habeas corpus review for exclusion cases. *See Hearings on H.R. 1915 and H.R. 1929 Before the House Subcomm. on Immigration and Claims*, 1995 WL 407976 (June 29, 1995) (testimony of T. Alexander Aleinikoff). The lack of discussion of habeas corpus in immigration cases during the consideration of the AEDPA legislation is particularly interesting, as much of AEDPA concerned congressional limits on federal habeas review of state criminal convictions. *See generally* Note, *Rewriting the Great Writ: Standards of Review of Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868 (1997) (describing the AEDPA changes). The author was among other professors who wrote letters to Congress about the ill-advised nature of the judicial review restrictions and suggested that habeas corpus jurisdiction would be implicated. One of these letters was introduced into the Congressional Record by Senator Leahy. *See* 142 CONG. REC. S11906-07 (daily ed. Sept. 30, 1996). Further, the IIRAIRA provisions were adopted following the Supreme Court's decision in *Felker v. Turpin*, 116 S. Ct. 2333, 2338 (1996), which held that 28 U.S.C. § 2241 would not be repealed by implication. Given the presumption that Congress knows the state of the law, and if the past consideration of specific exclusions are read to limit implied exclusion, courts should be reluctant to find an implied repeal of 28 U.S.C. § 2241.

297. This argument was accepted in *Yang v. INS*, 109 F.3d 1185 (7th Cir. 1997).

298. *See id.* at 1195 (citing United States *ex rel.* Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 106 (1927) and United States *ex rel.* Tisi v. Tod, 264 U.S. 131, 132 (1924)).

299. *See Yang*, 109 F.3d at 1196-97.

300. I do not agree with his assessment and believe his opinion is wrong in assuming an implied repeal of 28 U.S.C. § 2241. In an opinion issued several weeks following *Yang*, the Seventh Circuit appeared to leave open the possibility of asserting habeas jurisdiction under 28 U.S.C. § 2241. *See* Chow v. INS, 113 F.3d 659 (7th Cir. 1997).

nitude. The stakes for the government are that the habeas corpus form raises issues of constitutional power. Further, if the litigant is successful, the precedent would be established on constitutional grounds and thus have much greater implications for the adjudication of other similar petitions.[301]

But perhaps the issue of repealing 28 U.S.C. § 2241 will be resolved in another way. If IIRAIRA repeals the statutory basis for habeas corpus jurisdiction, then the question is what gives a federal court jurisdiction to hear constitutional claims of habeas corpus? Federal Courts are courts of limited jurisdiction.[302] Where the Constitution does not expressly create original jurisdiction, Congress must create a statute conferring federal court jurisdiction. Notwithstanding this general proposition, one circuit court of appeals has referred to a "free standing" power in the federal courts to hear a constitutional writ of habeas corpus.[303] This also appears to be the position of the government in arguing that IIRAIRA repealed habeas corpus under 28 U.S.C. § 2241, but acknowledging that some limited habeas corpus review for pure constitutional questions remains. This reading may be necessary to avoid the construction of the statute as a suspension of the writ of habeas corpus and thus avoids the finding that the provision is unconstitutional as a violation of the Suspension Clause.[304]

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301. These implications and others are further examined in Part V.C.

302. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

303. *See* Kolster v. INS, 101 F.3d 785, 790-91 n.4 (1st Cir. 1996).

304. There is another way to read the elimination of federal court jurisdiction of habeas corpus without finding that it suspends the writ. The statute might be construed as eliminating federal court jurisdiction, but allowing the states to exercise habeas corpus over immigration cases. This is a difficult construction, for the heading of section 242(g) reads "Exclusive Jurisdiction," which at least implies an intent to have exclusive federal court jurisdiction. This construction would require a reexamination of the ruling in *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871). The Supreme Court held that no state court has the power to use habeas corpus to release an individual from federal custody. The reasoning of the court in *Tarble's Case* appears to rely in part on the availability of a federal writ of habeas to test the validity of the detention. *See id.* at 409. Professor Hart also suggested that state courts would ensure judicial review in situations where Congress eliminated federal court jurisdiction. *See* Hart, *supra* note 18, at 1363-66. He did not specifically discuss state court judicial review as a solution for immigration cases although a significant portion of his article concerns federal court review of immigration issues. Congress would clearly want to avoid the possibility of habeas review in state and territorial courts in immigration cases and the possible dilution of federal power over immigration.

C. *How Habeas Corpus Jurisdiction Defeats Streamlining and Creates Constitutional Challenges*

Even if habeas is limited to its narrowest form, there are many reasons why this type of judicial review will not result in the certain, efficient removal adjudication system that Congress desired.

1. *The Evolution of the Custody Requirement*

The traditional strict custody requirement, which was part of the early habeas corpus jurisdiction, has been greatly expanded over the past forty years. In the criminal law context, the Supreme Court has dramatically extended the right to seek habeas corpus review by expanding the conception of "custody." The modern trend has been to recognize general constraints on liberty as sufficient to create habeas corpus jurisdiction.[305] Today, most courts recognize that constructive custody is sufficient for habeas corpus subject matter jurisdiction.[306]

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305. *See* Hensley v. Municipal Court, 411 U.S. 345, 351-52 (1973) (holding that a person conditionally released on his own recognizance pending execution of sentence is "incustody" within the meaning of 28 U.S.C. § 2241); Jones v. Cunningham, 371 U.S. 236, 241-43 (1963) (holding that a state parolee, under a parole order that imposed numerous conditions and restrictions on his liberty, was "in custody" within the meaning of 28 U.S.C. § 2241 to entitle him to habeas review).

306. *See, e.g.*, Yesil v. Reno, 985 F. Supp. 828, 837-40 (S.D.N.Y. 1997) (petitioner under final order of deportation but not in actual custody of the INS; applying 28 U.S.C. § 2241). *Cf.* United States *ex rel.* Marcello v. District Dir., 634 F.2d 964, 966-72 (5th Cir. 1981) (holding that "actual, physical custody in a place of detention," or release on bail or personal recognizance after such, is required for district court habeas jurisdiction, yet allowing habeas review because alien was under supervised parole and thus "in custody"). The Fifth Circuit may have read a strict custody requirement into former INA § 106 because the Court was trying to understand why Congress allowed both a petition for review and habeas jurisdiction to review deportation orders under the former INA § 106. The Fifth Circuit coupled a strict custody requirement with a broad scope of review in habeas to reconcile the "streamlining" goals of Congress in adopting section 106 in 1961. See the discussion in *El-Youssef v. Meese*, 678 F. Supp. 1508, 1513-17 (D. Kan. 1988) (not determining custody issue but addressing the scope of review in habeas corpus under former INA § 106). *See, e.g.*, Galaviz-Medina v. Wooten, 27 F.3d 487 (10th Cir. 1994) (holding that the combination of an INS detainer and a final deportation order lodged against petitioner met the custody requirement of the former INA § 106(a)(10), even though petitioner "[was] serving time for a criminal conviction and [sought] relief not from the conviction itself, but from orders [that arose] from his deportation proceedings). *See also* Flores v. INS, 524 F.2d 627, 629 (9th Cir. 1975) (per curiam) (finding deportation order was significant interference with freedom to support habeas jurisdiction); Lieggi v. INS, 389 F. Supp. 12, 15 (N.D. Ill. 1975) (resident alien only under demand to surrender for deportation allowed habeas), *rev'd without opinion*, 529 F.2d 530 (7th Cir. 1976); Varga v. Rosenberg, 237 F. Supp. 282, 285-86 (S.D. Cal. 1964) (holding that the requirement of custody was satisfied since petitioner was subject to a deportation order, even though he was not in

The government will undoubtedly try to establish a very strict custody requirement to narrow the ability of aliens to seek judicial review and even to avoid review.[307] Actual custody may also become the rule rather than the exception given the new statutory requirements of detention and the immigration policies increasing discretionary detention.[308]

2. *Removal Does Not Defeat Jurisdiction*

The right to habeas corpus review attaches with the custody of the noncitizen but is not defeated by removal of the person from the jurisdiction of the court or the territory of the United States. There are early cases allowing habeas corpus jurisdiction to continue even after the petitioner's departure.[309] Continuing jurisdiction is also consistent with the statutory change which repealed the former elimination of federal court jurisdiction when the noncitizen left or was removed from

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actual physical custody due to posting of a bond). For additional cases, see LIEBMAN & HERTZ, *supra* note 31, § 8.2(d)(18), at 206 & n.42.

Courts have also relaxed the venue requirements of habeas jurisdiction. *See, e.g.*, Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 493-501 (1973) (concerning habeas review of a state criminal conviction). In contrast to the new section 242, which seeks to restrict venue selection to the location of the immigration proceedings and thus gives the INS great control over the forum, venue under habeas may be appropriate wherever the attorney general or her delegates exercise control over the noncitizen or where he resided before custody was established. *See, e.g.*, Mojica v. Reno, Nos. CV 97-1085, CV 97-1869, 1997 U.S. Dist. LEXIS 8959, at *116-20 (E.D.N.Y. June 24, 1997) (absent specific statutory restrictions, venue is appropriate based on "traditional venue considerations" of location where the material events took place, convenience of the forum, location of witness, etc.); Nwankwo v Reno, 828 F. Supp. 171, 174-76 (E.D.N.Y. 1993) (holding, limited to its facts, that venue proper where alien formerly resided although not in custody in that district; Attorney General was appropriate officer where writ presented solely questions of law and did not require production of the alien). *Cf.* Ozoanya v. Reno, No. 96-1985, 1997 U.S. Dist. LEXIS 9101, at *24-25 (D.D.C. June 25, 1997) (transferring pro se habeas petition filed to the United States District Court for the Western District of Louisiana because petitioner was incarcerated in the INS Oakdale, La., detention center).

There are also issues of personal jurisdiction. *See* Carvajales-Cepeda v. Meissner, 966 F. Supp. 207, 208 (S.D.N.Y. 1997) (holding the court lacked personal jurisdiction over petitioner's custodian); *Ozoanya*, 1997 U.S. Dist. LEXIS 9101, at *24-25 (holding the court lacked personal jurisdiction over the petitioner's custodian and transferring the case accordingly). *Cf. Yesil*, 958 F. Supp. at 835-36 (finding personal jurisdiction in the Southern District of New York over the New Orleans INS District Director).

307. Even if courts do not require actual custody, the INS appears to demand it. In New York, attorneys report that the INS is issuing a surrender notice to all noncitizens who file petitions for habeas corpus and the noncitizen must submit to detention. *See* Memorandum of Ken Schultz, President New York Chapter of the American Immigration Lawyers Association, May 1997 (on file with author).

308. *See* Margaret H. Taylor, *The 1996 Immigration Act: Detention and Related Issues*, 74 INTERPRETER RELEASES 209 (Feb. 3, 1997).

309. *See* LIEBMAN & HERTZ, *supra* note 31, at § 8.2(b).

the United States.[310] Of course, if removal is the principal goal, then this factor does not defeat Congress' plan. But, nevertheless, the continued appeals will result in administrative costs and possible further government expense.[311]

3. *Multi-Tiered Review*

Habeas decisions under 28 U.S.C. § 2241 may be appealed to the circuit courts of appeals and by certiorari to the Supreme Court.[312] The creation of multiple levels of review is one of the reasons the government is arguing that the limited form of constitutional habeas review should take place in the courts of appeals.[313] Judge Easterbrook has also noted that Congress could not have intended for habeas review in the general case because multiple layers of review defeat the very efficiency Congress sought to create.[314] Multi-tiered review obviously requires more time and resources for all of the parties. In the past, reform bills would have eliminated habeas review in the district court and moved all review to the courts of appeals.[315]

Even if noncitizens are limited to habeas under the Constitution, the cases are likely to be appealed. The jurisdictional authority for an appeal is as unclear as the jurisdictional authority for constitutional

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310. Former section 106(c) provided that the voluntary or involuntary departure of the alien during the pendency of judicial review terminated the federal court jurisdiction. Most circuit courts interpreted this departure requirement strictly. *See, e.g.*, Quezada v. INS, 898 F.2d 474 (5th Cir. 1990); Roldan v. Racette, 984 F.2d 85 (2d Cir. 1993). For a discussion of the prior statute which eliminated jurisdiction upon departure, see Peter J. Spiro, *Leave for Appeal: Depature as a Requirement for Review of Deportation Orders*, 25 SAN DIEGO L. REV. 281 (1988). A few circuit courts recognized a narrow exception to the termination of jurisdiction. These courts allowed continuing jurisdiction where the alien was removed in violation of her statutory, due process or other constitutional rights. *See* Mendez v. INS, 563 F.2d 956 (9th Cir. 1977). These cases are discussed in Lenni B. Benson, *By Hook or By Crook: Exploring the Legality of an INS Sting Operation*, 31 SAN DIEGO L. REV. 813 (1994).

311. For example, in *Singh v. Waters*, 87 F.3d 346 (9th Cir. 1996), the court permitted the INS to locate and return Mr. Singh to the United States at the government's expense.

312. *See* 28 U.S.C. § 2253(a).

313. To date, the courts of appeals have dismissed petitions for review and referred the petitioner to the district court to file a habeas petition. *See, e.g.*, Duldulao v. INS, 90 F.3d 396, 400 (9th Cir. 1996) (dismissing appeal of deportation hearing based on criminal felony charges); Duldulao v. INS, 958 F. Supp. 476 (D. Haw. 1997) (habeas writ dismissed on grounds that abuse of discretion by officials and improper admission of hearsay at hearing could not be the basis for a habeas claim but were a veiled attempt at direct review). *See also supra* note 254 (discussing of the pending consideration of this issue in *Magaña*).

314. Yang v. INS, 109 F.3d 1185, 1195 (7th Cir. 1997).

315. *See, e.g.*, *Forum Choices*, *supra* note 114, at 1345-48 (discussing advantages and disadvantages with exclusive review of habeas corpus orders by courts of appeal).

habeas.[316]

4. *Lack of General Res Judicata Principles*

Traditionally, res judicata principles have not been applicable in habeas corpus. The very purpose of the writ is to establish the legality of the underlying custody and not to protect the efficiency or finality concerns served by the res judicata doctrine.[317] To avoid repetitious litigation in the new section 242, Congress incorporated res judicata type limits on judicial review of immigration cases.[318] If Congress had provided for habeas review under section 242, then habeas petitions would have been limited by these statutory limits. But when the default grant of habeas jurisdiction is asserted, it is not at all certain that the same restrictions on relitigation of issues will apply. Of course, courts may use other devices such as the "successive petitions" or the "abuse of the writ" doctrines[319] to limit habeas petitions, but the point is that Congress, by failing to specifically address habeas corpus jurisdiction, has thrown open this issue at least for the near future.

5. *Evidentiary Hearings*

Habeas corpus jurisdiction might also lead to the possibility of expansion of the administrative record by new evidentiary hearings. Congress avoids this result for those proceedings covered by section 242.[320] Possibly, federal district courts may order discovery or evidentiary hearings in habeas proceedings. Habeas corpus is a civil proceeding and the rule of civil procedures apply.[321] In other areas of habeas corpus, special rules of civil procedure apply.[322] However, it is not

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316. *See* discussion of jurisdiction for constitutional habeas *supra* text accompanying notes 302-04.

317. *See* LEIBMAN & HERTZ, *supra* note 31, §§ 2.4(b), 2.4(d), 28.2.

318. *See* INA § 242(c)(2). These same limits were also in the section 106 statute and were designed to limit the scope of habeas review following consideration of a petition for review.

319. LIEBMAN & HERTZ, *supra* note 31, § 28.4. The "miscarriage of justice" standard is also used in these doctrines which limit repetitious review. See *supra* note 266 for a discussion of the origin of the "miscarriage of justice" standard.

320. *See* INA § 242(b)(4)(A).

321. FRCP Rule 81(a)(2) provides in pertinent part:

> These rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. The writ of habeas corpus, or the order to show cause, shall be directed to the person having custody of the person detained.

322. *See, e.g.*, Rule 6 for 28 U.S.C. § 2254 (state criminal habeas review); 28 U.S.C. § 2243 (federal prisoner habeas).

clear that those restrictions should apply to 28 U.S.C. § 2241. It is also not clear that pure constitutional habeas review includes a right to evidentiary hearings.

Certainly, cases which have invoked 28 U.S.C. § 2241 as a part of their jurisdictional authority have resulted in discovery and evidentiary hearings, but these cases also asserted general federal question jurisdiction.[323] Although Congress may, by implication, repeal section 1331 jurisdiction, it has not impliedly repealed some form of habeas jurisdiction.[324] Thus, district courts will develop individual rules for the handling of these cases until Congress acts to clarify the jurisdiction and procedure.

6. *Expansion of Constitutional Rights for Noncitizens*

Prior to 1961 when habeas corpus was the main vehicle for review, courts were interpreting a "different" constitution. There has been an expansion of many constitutional rights and evolving concepts of procedural due process, equal protection and other constitutional doctrines which protect individual rights. In the general arena of administrative law, there has been a vast expansion of procedural due process guarantees.[325] Despite the rhetoric of the immigration plenary power doctrine, some recent Supreme Court cases have applied constitutional due process to immigration cases.[326]

Faced with the confusion over the type of issues which can be heard in habeas corpus petitions, litigants will attempt to assert constitutional claims to preserve the court's jurisdiction.[327] Of course, not

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323. *See, e.g.*, Jean v. Nelson, 472 U.S. 846 (1985) (remanding for consideration of habeas relief; jurisdiction based on 28 U.S.C. §§ 2241 and 3331).

324. *See supra* note 212.

325. *See, e.g.*, Matthews v. Eldridge, 424 U.S. 319 (1976) (creating a balancing test to determine procedural due process in administrative proceedings). Even with subsequent retrenchment, contemporary constitutional rights analysis is much broader than the case law of the early part of this century.

326. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21 (1982) (finding that returning lawful permanent resident was entitled to procedural due process in exclusion proceedings at the border). This case has a direct implication for the expedited removal proceedings which is why the statutory scheme contemplates a referral for a full removal proceeding when a claim of lawful permanent resident status is made. But perhaps future courts will find other aliens with significant ties to the United States have significant due process claims notwithstanding a lack of formal immigration status. *See also* American-Arab Anti-Discrimination Comm. v. Reno, 1997 WL 395300 (9th Cir. 1997) (1st Amendment); Rafeedie v. Reno, 880 F.2d 506 (D.C. Cir. 1989) (1st Amendment); Garberding v. INS, 30 F.3d 1187 (9th Cir. 1994) (equal protection); Francis v. INS, 532 F.2d 268 (2d Cir. 1976) (equal protection).

327. *See, e.g.*, *In re* Low Yam Chow, 13 F. 605 (Cir. Ct. Dist. Cal. 1882) (reading Chow's

every case will contain a constitutional claim. However, where it is possible for litigants to allege a constitutional violation, they will do so to support the court's exercise of jurisdiction.[328] The unintended result may be that some judges, in an effort to overturn abusive discretionary actions or erroneous statutory interpretations, may base their decisions on constitutional grounds. This constitutionalization of immigration law is explored in the next section.

VI. THE UNINTENDED CONSEQUENCES OF ATTACKING JUDICIAL REVIEW

Less than one year after the passage of IIRAIRA, it is too soon to predict all of the consequences of the congressional attack on judicial review in immigration cases. This Article has focused on the probable judicial reaction of both reviving habeas corpus jurisdiction and finding jurisdiction to review cases presenting "pattern and practice" constitutional challenges to the immigration laws or procedures. But limiting judicial review to constitutional claims necessarily invites the courts to evaluate the constitutional rights of noncitizens. The 1996 legislation expanded the grounds of deportation and eliminated or altered many forms of discretionary relief. Given the possible lifetime banishment of long-term permanent residents or other sympathetic noncitizens, courts may look for ways to limit the government's power over immigration.[329] It may be that some courts will feel compelled to curtail the immigration plenary power doctrine and to allow noncitizens to assert a full array of substantive constitutional rights.

In the past, due to the immigration plenary power doctrine and its restraint on the development of substantive constitutional rights, courts employed a variety of statutory construction techniques or procedural due process surrogates that resulted in the protection of noncitizens. In

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claims as presenting a due process challenge to the nature of the deportation hearing itself and suggesting habeas review would be available but not deciding the jurisdictional authority for habeas); Ozoanya v. Reno, 968 F. Supp. 1 (D.D.C. 1997) (transferring the petition for adjudication but finding that the noncitizen had raised the following possible constitutional challenges: due process right to counsel, due process refusal to change venue, due process right to appeal a deportation order, equal protection denial of relief).

328. *See* Lenni Benson, *Surviving to Fight Another Day: Preserving Issues for Appeal, in* II 1995-1996 IMMIGRATION AND NATIONALITY LAW HANDBOOK 353-66 (R. Patrick Murphy et al. eds., 1995). In that article, I discuss how to preserve constitutional claims in administrative hearings before an agency not empowered to rule directly on constitutional claims.

329. *See* INA § 212(a)(9).

two important articles, Hiroshi Motomura documented both of these approaches. He first wrote of the presence of "phantom norms," representing constitutional values in immigration decisions that influenced judicial interpretation of statutory and regulatory provisions. These phantom constitutional norms sometimes led courts to shield the noncitizen from the harshness of the plenary power doctrine without ruling on the substantive constitutional claim.[330] In a second article, Professor Motomura explored how courts in immigration cases sometimes relied on procedural due process surrogates for substantive constitutional rights.[331] Both of these approaches avoided the substantive constitutional issues. Professor Motomura gave several reasons why judicial analysis distorted by phantoms or surrogates is problematic and ultimately ill-advised.[332] This analysis is a helpful starting point for evaluating the impact of the constitutionalization of immigration cases.

The constitutionalization of immigration law will distort the development of immigration law by limiting judges to *exclusively* consider "substantial constitutional issues." Constitutionalization may eliminate the technique of relegating constitutional norms to influential phantoms. If courts cannot rely on statutory or regulatory construction then, in some cases, the phantom substantive constitutional norms will be made "real" and the substantive constitutional rights of noncitizens will be directly enforced.[333] The ironic result may be that Congress, in exercising both its plenary power over lower court jurisdiction and its plenary power over immigration, has created an environment which might ultimately lead the judiciary to reduce congressional and executive power over immigration through vigorous protection of the habeas corpus petition or by preservation of other types of jurisdiction to consider constituitonal claims. The more likely, immediate result may be that lower courts will follow the precedents of the plenary power doctrine and therefore reject substantive constitutional challenges.[334] Neverthe-

330. *See* Motomura, *Phantom Constitutional Norms*, *supra* note 9.

331. *See* Motomura, *Procedural Surrogates*, *supra* note 9.

332. Professor Motomura recognized that even if courts abandoned these strategies, they might not necessarily also abandon the plenary power doctrine. However, he argued that opinions which openly confronted the lack of substantive constitutional rights for noncitizens would lead to a more honest and thoughtful development of immigration law. *See id.* at 1699-1704; Motomura, *Phantom Constitutional Norms*, *supra* note 9, at 612-13.

333. A recent example is the protection of First Amendment rights in *American-Arab Anti-Discrimination Committee v. Reno*, discussed in Part IV.

334. *See, e.g.*, Yang v. INS, 109 F.3d 1185 (7th Cir. 1997) (rejecting elimination of petition for review as a violation of due process or the separation of powers and partially relying on the plenary power doctrine deference to Congress); Catholic Soc. Servs., Inc. v. Reno, No. 96-

less, the direct consideration of these issues may lead to a "steady erosion" of the plenary power doctrine.[335]

Given that procedural due process is one of the only constitutional protections courts have recognized, constitutionalization of immigration litigation will also lead to a dramatic increase in claims based on procedural due process. In some cases, these claims will be based on recognized procedural rights, but in others, the claim will be meant as a replacement for some other substantive constitutional right or even as a substitute for the lack of substantive statutory protections.[336] While I hope that courts will vigorously preserve the due process rights of noncitizens, inappropriate reliance on procedural due process can have negative consequences for all parties.

In the landmark case *Mathews v. Eldridge*,[337] the Supreme Court created a three-part balancing test for determining whether an administrative procedure meets the requirements of procedural due process. The first factor is to identify the individual's interest at stake in the administrative adjudication or application of a rule. Second, the court should examine the probable value of additional procedural safeguards and the ability of these safeguards to ensure accurate decisionmaking. These two factors must be balanced against the governmental interests at stake. The government's interest includes the burdens on efficient enforcement and the cost of additional or substitute procedures. The Supreme Court specifically referred to these balancing factors in *Landon v. Plasencia*,[338] a case which established that lawful permanent residents were entitled to procedural due process in exclusion proceedings. In several different contexts, lower courts have used the *Mathews v. Eldridge* factors to order new and different procedures. These

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15495, 1997 U.S. App. LEXIS 9094 (9th Cir. Feb. 11, 1997) (rejecting the claim that the retroactive statutory change concerning eligibility to contest the government regulations concerning eligibility for legalization partially relying on plenary power rationale); Duldulao v. Reno, 958 F. Supp. 476 (D. Haw. 1997) (district court rejected ex post facto challenge to elimination of relief from deportation).

335. This description is the hopeful prognosis of Professor Legomsky in his article *Ten More Years of Plenary Power*, *supra* note 6, at 936-37. He reluctantly buries his prior hopes of complete abandonment and suggests that the transformation of immigration law will come from a continued weakening of the doctrine. *See id.* He wrote the article before the current attacks on the courts' jurisdiction to conduct any review at all.

336. Professor Motomura thoroughly documented this point in Motomura, *Procedural Surrogates*, *supra* note 9.

337. 424 U.S. 319 (1976).

338. *See supra* note 9, at 34-35. The Supreme Court did not decide what procedures were necessary but remanded to the lower courts to consider the *Mathews v. Eldridge* factors.

changes were necessary to protect the due process rights of noncitizens; nevertheless, the court ordered changes led to years of delay in adjudication.[339] Of course, Congress and the INS might have avoided the litigation by adequately protecting these rights. Several scholars have noted that where Congress delegates almost unlimited control to the INS and does not carefully delimitate the scope of the agency's powers, courts are likely to "jump in" to create new procedural due process limitations in an effort to protect the interest of the noncitizen and to try to ensure accuracy in decisionmaking.[340]

Judicial creation of new procedural due process protections can lead to reluctance to create new substantive statutory rights. For example, Congress may have created bars to eligibility for relief from removal for certain aliens with criminal convictions out of a perception that these people abused procedural protections to delay their removal. By eliminating the statutory relief, Congress may have believed they eliminated all of the substantive rights which required procedural protections. Long-term permanent residents will now present substantive due process claims to remain in the United States. In the past, these claims have not prevailed.[341]

Procedural due process can also add to the cost of programs. If courts create new procedures, Congress cannot anticipate the cost of the immigration enforcement or adequately define the administrative structure. Yet Congress should recognize that it bears at least partial responsibility for the courts stepping in to determine the appropriate procedure. A partial remedy for the uncertainty created by judicial enforcement of procedural due process norms is congressional enactment of legislation that both clearly defines eligibility for relief from removal and includes detailed, fair procedures that the agency must follow in implementing the law.[342]

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339. *See, e.g.*, Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43 (1993). *See also* discussion *supra* Part II.

340. *See, e.g.*, T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 259 (1983); Motomura, *Procedural Surrogates*, *supra* note 9, at 1701; Motomura, *Phantom Constitutional Norms*, *supra* note 9, at 606; Verkuil, *supra* note 116, at 1179-82. *See also* Martin, *supra* note 112, at 1267.

341. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (no substantive right to remain in the United States upholding retroactive deportation for past membership in the Communist Party and rejecting claim that deportation is a form of ex post facto punishment prohibited by the Constitution).

342. Congress has, from time to time, taken greater care in specifying procedural protections for noncitizens. For example, Congress clarified the notice and procedural protections required in deportation hearings in former INA § 242, amended and recodified in new INA § 240.

Constitutionalization of immigration litigation also raises troubling problems for noncitizens. Establishing a substantive constitutional claim or a procedural due process claim often requires that the noncitizen develop a factual record in a district court.[343] It can be difficult, even impossible, to develop a sufficient record to assert either a substantive or a procedural due process claim in the administrative proceeding. As noted previously, neither the Immigration Judge nor the BIA has the authority to hear or decide many forms of constitutional questions.[344] In these administrative proceedings or in appellate review specifically limited to the administrative record, the noncitizen will not have had an opportunity to develop the factual predicates necessary to the finding that some constitutional right has been harmed. Many of the recent constitutional challenges have been brought in class action suits in district court where advocates have directly challenged the agency's implementation of the law or the lack of procedural protections in the statutes.[345] To present these types of claims, teams of lawyers have had to conduct factual investigations, formal discovery, and survive rounds of procedural motions. Similarly, where attorneys wanted to protect substantive rights, they have frequently used an offensive strategy by filing actions to enjoin the INS from initiating or continuing removal actions.[346] These strategies also require sophisticated counsel. Pro se petitioners are unlikely to adequately assert "selective prosecution," First Amendment protections, lack of substantive or procedural due process or arguments based on principles of equitable estoppel.[347]

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343. *See, e.g.*, American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1055 (9th Cir. 1995) (selective enforcement claims cannot be heard or developed in administrative proceedings), *reaff'd*, 1997 WL 395300 (9th Cir. 1997).

344. *See supra* cases discussed in note 223. *But cf.* Rashtabadi v. INS, 23 F.3d 1562, 1567 (9th Cir. 1994) (some due process objections must be raised in the administrative process to allow the agency an opportunity to cure the procedural defect).

345. *See, e.g.*, Catholic Soc. Servs. v. Reno, 509 U.S. 43 (1993) (considering due process challenge to INS implementation, but remanding for determination of standing); Reno v. Flores, 507 U.S. 292 (1993) (reviewing and rejecting due process challenge to juvenile regulation); INS v. National Ctr. for Immigrant Rights, 502 U.S. 183 (1991) (due process challenge to INS bond and work authorization avoided by statutory interpretation); McNary v. Haitian Refugee Ctr., 498 U.S. 479 (1991) (holding that the district court had jurisdiction to hear due process challenges to the manner in which the INS administered statutory procedures).

346. *See, e.g.*, American-Arab Anti-Discrimination Comm. v. Reno, No. 96-55929, 1997 WL 395300 (9th Cir. 1997); Tefel v. Reno, No. 97-0805-CIV-KING, 1997 WL 369980 (S.D. Fla. May 20, 1997).

347. For example, in a recent case, a detained lawful permanent resident filed a pro se habeas corpus petition and the district court judge appointed pro bono counsel to brief the arguments in support of the habeas petition. *See* Ozoanya v. Reno, 968 F. Supp. 1 (D.D.C.

Finally, *exclusive* constitutional decisionmaking may lead to a form of balkanization where parties assert competing views of the constitutional rights of noncitizens.[348] Constitutionalization does not allow for the same variety of nuanced analysis or the careful development of rights and interests that a traditional judicial process includes.[349] Constitutional adjudication can be a blunt instrument which creates both constitutional winners and losers and then enshrines the victory in stare decisis.

If full substantive constitutional rights are established, Congress and the Executive may have a diminished capacity to develop immigration policies or to respond to particular emergencies. Although I support the abolition of the plenary power doctrine, I recognize that the establishment of full constitutional rights may weaken the ability of the government to use categorical approaches that, in many instances, have been unobjectionable.[350] For example, suppose that the Supreme Court

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1997). Mr. Ozoanya was particularly fortunate to have had Robert E. Juceam, Douglas W. Baruch, and R. Patrick Murphy of the firm of Fried, Frank, Harris, Shriver & Jacobson and Kimberly Kolch of Proyecto Libertad. Robert Juceam has litigated several immigration cases before the Supreme Court. Both he and Mr. Murphy, another very experienced immigration attorney, have edited the Annual Conference Books of the American Immigration Lawyers' Association for many years and are respected for the breadth of their knowledge. Mr. Ozonaya and his attorneys were able to amend his pleadings and to articulate a number of constitutional challenges, including a due process challenge to the retroactive elimination of relief from deportation and lack of counsel, an equal protection challenge to the BIA's interpretation of the elimination of the former INA § 212(c) relief, and a due process challenge to the failure of the INS to adequately inform noncitizens of their appellate rights. These claims were not resolved but transferred with the habeas petition to the Western District of Lousiana because the court concluded that it lacked personal jurisdiction over Mr. Ozoanya's custodian. *See id.* at 8. The Court ordered a stay of Mr. Ozoanya's removal pending the adjudication of his habeas petition. It is not likely that Mr. Ozoanya would have had the legal expertise to raise these Constitutional issue had he continued pro se.

348. The judicial avoidance of constitutional decisionmaking in statutory interpretation is motivated in part to avoid a confrontation with the political branches. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (courts should construe statutes to avoid constitutional doubts). The same prudential reasons which support such a canon argue against exclusive constitutional litigation. There is a large body of literature concerning the efficacy and role of the canons in statutory and constitutional construction. *See, e.g.*, Symposium, *A Reevaluation of the Canons of Statutory Construction*, 45 VAND. L. REV. 529 (1992). *See also* KARL LLEWELLYN, THE COMMON LAW TRADITION 521-35 (1960) (canons on statutes); RICHARD POSNER, THE FEDERAL COURTS 285 (1985) (criticizing the inappropriate avoidance of constitutional issues).

349. Professor Motomura described the problem of developing a clear and honest dialogue as occurring because the immigration plenary power doctrine precluded the enforcement of constitutional norms, and modern courts, in trying to evade the strictures of the doctrine, evaded the full discussion through subconstitutional rationales. *See* Motomura, *Phantom Constitutional Norms*, *supra* note 9, at 549, 607-13.

350. Unfortunately, history shows many examples of racist and ethnic discrimination in our

had been limited to consideration of the equal protection question raised in *Jean v. Nelson*.[351] In that case, a group of Haitians challenged the INS policy of routinely refusing "parole" admission to people from Haiti when the agency routinely released others from custody. The petitioners alleged that this distinction was based on impermissible national origin discrimination in violation of their Fifth Amendment rights to equal protection of the law. The Supreme Court did not reach the constitutional issue but found that the facially neutral detention regulations prohibited discrimination in the implementation of the immigration laws and remanded the case to allow the lower court to determine if the INS had actually discriminated. Justice Marshall filed a detailed dissent, arguing that the statutes and regulations challenged could not be read as precluding national origin discrimination and that the Court had to reach the constitutional claims. Justice Marshall found that even aliens seeking initial entry to the United States are entitled to due process and equal protection under the Fifth Amendment. He recognized that his holding might restrict the ability of Congress or the Executive to base some aspects of immigration policy on national origin distinctions:

> This dissent is not the place to determine the precise contours of petitioners' equal protection rights, but a brief discussion might clarify what is at stake. It is clear that, consistent with our constitutional scheme, the Executive enjoys wide discretion over immigration decisions. Here, the Government would have a strong case if it showed that (1) refusing to parole Haitians would slow down the flow onto United States shores of undocumented Haitians, and that (2) refusing to parole other groups would not have a similar deterrent effect. Then, its policy of detaining Haitians but paroling other groups might be sufficient-

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immigration laws. I do not mean to ignore the errors of the past. Even when discrimination may not have been intentional, considerations of national origin and race appear to have inappropriately influenced the enforcement of the immigration laws. *See* Martin, *supra* note 112, at 1305 (including statistics that might indicate disparate treatment in the adjudication of asylum applications based on nationality of applicant). This point was noted in Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy over Immigration*, 71 N.C. L. REV. 413, n.151 (1993) (analyzing Supreme Court decisions which use plenary power doctrine or similar constructions to discourage immigration litigation and to overturn judicial challenges). Professor Johnson interprets Professor Martin's statistics as indicating disparate treatment in adjudication of asylum applications based on the nationality of the applicant.

351. 472 U.S. 846 (1985).

> ly related to the valid immigration goal of reducing the number of undocumented aliens arriving at our borders to withstand constitutional scrutiny . . . .
>
> It is also true that national origin can sometimes be a permissible consideration in immigration policy. But even if entry quotas may be set by reference to nationality, national origin (let alone race) cannot control every decision in any way related to immigration . . . .[352]

Of course, the Supreme Court's recognition of equal protection rights does not necessarily mean that the Court would establish a strict scrutiny test for national origin discrimination in this context. Perhaps the court would only require a form of intermediate scrutiny or, most probably, adopt a form of a low level rational basis test.[353]

National origin is one of the characteristics which affects many aspects of immigration law and policy. For example, nationals of certain countries are exempt from visa requirements for nonimmigrant visits of less than ninety days.[354] As Justice Marshall mentioned, our immigrant quota system is based on categories of preferential qualifications such as employment or family relationship, but all of these preferences are limited by overall national origin country quotas.[355] Congress has sometimes used national origin considerations to dictate special consideration of claims of religious persecution or political asylum.[356] Supporters of full equal protection rights for noncitizens will applaud the judicial scrutiny of these national origin classifications, but even a low level rational basis test may mean increased litigation which in and of itself might unduly frustrate the statutory or regulatory scheme.[357]

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352. *Id.* at 880.

353. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (suggesting that the decisions of the government excluding aliens on ideological grounds need only be supported by some facially legitimate and bona fide reason).

354. *See* INA § 217. Canadians are exempt from the visa stamp requirement except for treaty trader or treaty investor petitions and for immigrant visa entry. *See* 8 C.F.R. § 212.1.

355. *See* INA § 203. These quotas are set by birth in a country, not citizenship. There are few exceptions to the national origin quota rules. *See* INA § 202(b) (cross-chargeability based on marriage or transient birth).

356. See, for example, the Lautenberg amendment granting Jews, Orthodox Christians, and Ukrainian Catholics special consideration in requesting refugee status in the former Soviet Union and other former communist countries. *See* Act of Nov. 21, 1989, Pub. L. No. 101-167, tit. V, § 599D, 103 Stat. 1261 (1989), codified at INA § 207.

357. Perhaps it was concern about the possible establishment of Fifth Amendment protections that led the government to pursue the strategy of interdiction at sea and to rely on the Supreme Court jurisprudence which has led to a lessening of constitutional protections for gov-

Although this is not the time or place to begin a detailed analysis of predicting exactly how the constitutionalization of immigration law may effect immigration adjuciation, I will briefly explore one other example. In *Mojica v. Reno*,[358] Judge Weinstein found that 28 U.S.C. § 2241 allowed him to consider the statutory challenges of the petitioners, and he found that the Attorney General had improperly interpreted AEDPA tc require application of the bar to section 212(c) relief to cases pending when AEDPA was enacted. He stated repeatedly that the case involved an issue of statutory interpretation. The petitioners raised several constitutional challenges, including a claim that retroactive application of the bar to relief would deny substantive and procedural due process. Ultimately, he ruled that retroactive denial of section 212(c) relief to the petitioners was prohibited as an improper interpretation of the statute and that a retroactive interpretation was constitutionally prohibited.[359] Judge Weinstein's opinion leaves little doubt that he was prepared to find that if the statute required retroactive application, it would violate due process.[360] If this holding was ultimately sustained, noncitizens would undoubtedly challenge the elimination of other statutory forms of relief and retroactive grounds of deportability. Again, although I would agree that Congress should be limited in the adoption of retroactive legislation as it is in other areas of law, I recognize that the establishment of this constitutional right for noncitizens would significantly alter the ability of Congress to define the member-

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ernment conduct outside the territory of the United States. The interdiction programs withstood statutory and treaty challenges in *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993). For a critique of these geographical limits to constitutional obligations, see NEUMAN, *supra* note 6.

358. *Mojica* is discussed in the text beginning *supra* note 275.

359. Judge Weinstein's opinion clearly indicated that retroactive application of the bar would violate due process. He distinguished *Harisiades* as concerning only whether the ex post facto clause prohibited retroactive grounds of deportability and as failing to address the lawful permanent resident's due process interests. A thoughtful examination of the constitutional illegitimacy of retroactivity in immigration law is found in Nancy Morawetz, *Rethinking Ex Post Facto Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV (forthcoming 1997) (unpublished manuscript on file with author).

360. Justice Weinstein discusses the constitutional restraints on retroactive legislation at length. *See* Mojica v. Reno, Nos. CV 97-1085, CV 97-1869, 1997 U.S. Dist. LEXIS 8959 (E.D.N.Y. June 24, 1997). He also seemed equally willing to consider international treaty obligations owed to lawful permanent residents and to base his rejection of the retroactive application of the bar on those grounds. *See id.* I have not considered how international treaty obligations might also restrict congressional power to eliminate judicial review. For a discussion of modern international law restraints on immigration power based on traditional notions of sovereignty, see Henkin, *supra* note 6. *See also* Michael A. Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965.

ship of our community.[361]

The constitutionalization of immigration law is a far cry from the stated congressional goal of "streamlining" judicial review. To some degree,[362] the integrity of our immigration laws and the continued support of the people of the United States for future immigration, requires that the government improve its ability to remove people who have violated our laws and its efficient use of immigration laws to prevent abuse of the system. Yet Congress has failed to consider adequately how the strong presumption of continuing judicial review over constitutional questions and the availability of habeas corpus jurisdiction will alter the streamlined design. A better approach would be to recognize the protected spheres of jurisdiction in habeas and constitutional adjudication and build a system which also allows consideration of important subconstitutional issues.[363]

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361. For example, until 1972, there was no ground of deportability for active participation in Nazi persecution during World War II. *See* INA § 237(a)(4)(D). The retroactive application of this statute was upheld in several challenges. *See, e.g.*, Linnas v. INS, 790 F.2d 1024 (2d Cir. 1986) (rejecting challenge to retroactive ground of deportation based on due process, equal protection, and the constitutional prohibition on bills of attainder).

362. As I have explained earlier, I do not believe that Congress can fairly accuse judicial review for the problems of delay or inefficiency in immigration law enforcement. And even if some individuals did use the statutory appeals to delay removal, other provisions of IIRAIRA would appear to frustrate the tactics of delay. For example, the fact that the statute no longer eliminates jurisdiction when the noncitizen departs helps to preserve the right to judicial review and yet allows the government to execute the final administrative order. I recognize that many people will not be able to afford attorneys to pursue the judicial proceedings if they are removed, but this is a practical obstacle not a statutory preclusion.

363. Perhaps immigration law will follow the course of judicial review of administrative decisions regarding the award of benefits by the Veteran's Administration. Congress tried to eliminate all judicial review of administrative benefits determinations. That attempt led to some of the same problems created by the 1996 immigration legislation. The former 38 U.S.C. § 211(a) barred review of decisions of the Administrator on benefits questions. However, in *Johnson v. Robison*, 415 U.S. 361 (1974), the Supreme Court held that a federal court could review constitutional claims of the benefit recipients. This, in turn, led to increasing numbers of constitutional challenges. In *Ryan v. Cleland*, 531 F. Supp. 724 (E.D.N.Y. 1982), the court noted the appearance of regular claims being brought as constitutional issues. In rejecting the claim that Veterans Administration's (VA) failure to provide medical care and treatment violated the Supremacy clause, the court noted, "[P]laintiff's attempt to elevate their claims to a constitutional level is certainly inventive, after careful consideration the court concludes that no bona fide constitutional issue [has been] presented." *Id.* at 730. For a contemporary discussion of how this preclusion statute might lead to constitutionalization, see Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905 (1983).

In 1988, Congress passed the Veterans Judicial Review Act, 102 Stat. 4105. This Act established an Article I court called the Court of Veterans Appeals. The Act gave this court jurisdiction to hear review of direct challenges to the VA regulations, and review of benefit

If the present attacks on judicial review are left undisturbed, it may be that over time, with enough case law, the contours of judicial review of immigration cases will result in the efficient removal of noncitizens. But until that theoretical day of legal certainty, it is my belief that what Congress has done in trying to limit judicial review is to move many of the battles into the ever changing territory of habeas corpus jurisdiction and to create an environment that may lead to the inappropriate constitutionalization of immigration cases.

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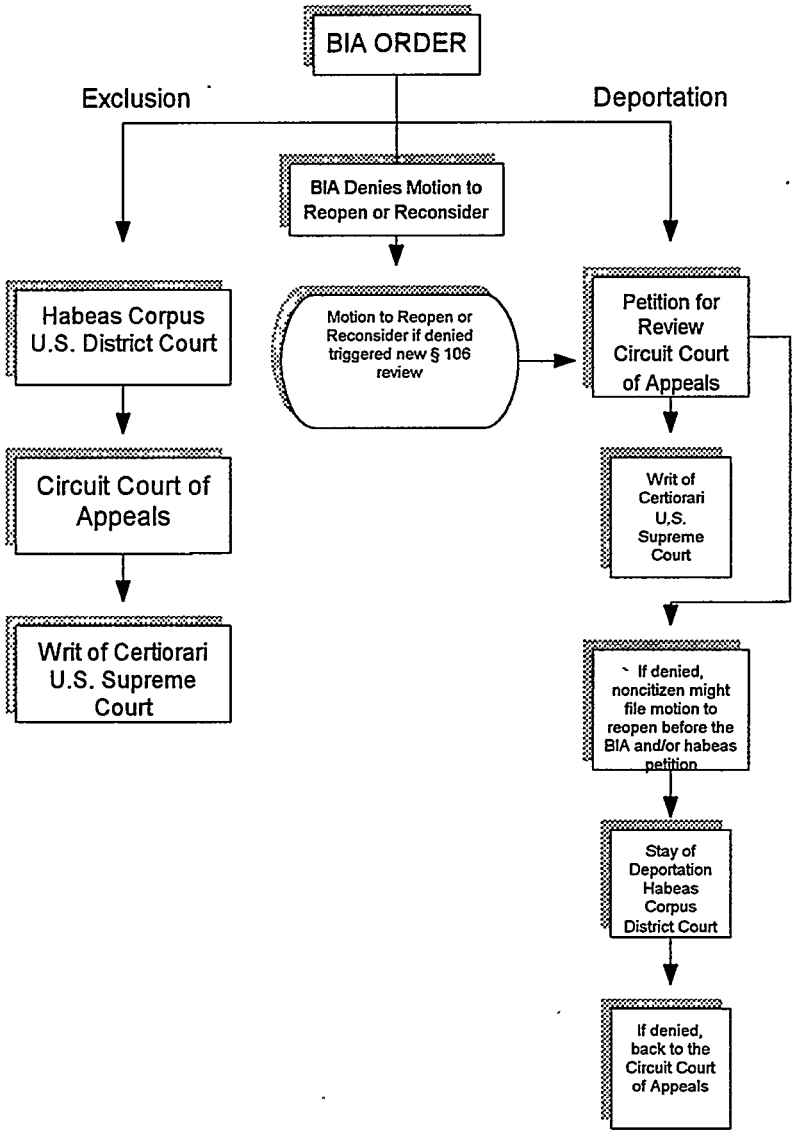
adjudications. Perhaps the return to judicial review was motivated by the fear of the growing constitutionalization of benefis adjudications. The return of judicial review is discussed in Jonathan Goldstein, *New Veterans Legislation Opens the Door to Judicial Review . . . SLOWLY!*, 67 WASH. U. L.Q. 889 (1989).

CHART 1

POSSIBLE JUDICIAL REVIEW
UNDER OLD § 106 [1961-1996]

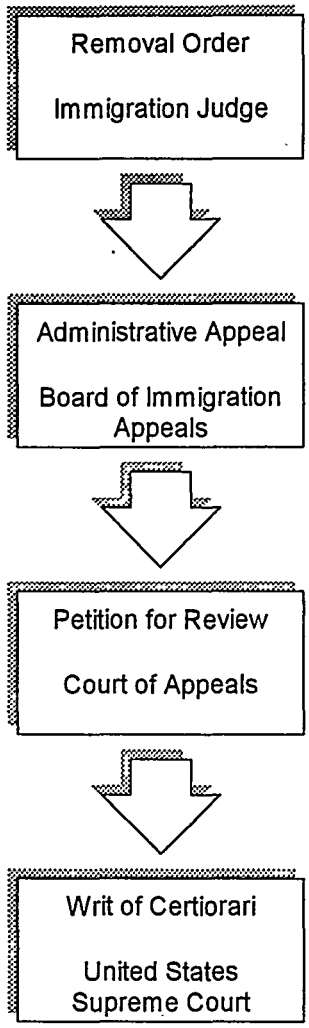


Notes: Automatic stay of removal upon filing petition for review for most cases.1996 Regulations limited timing and number of motions to reopen/reconsider. With rare exception, departure from the U.S. vacated federal court jurisdiction.

CHART 2

JUDICIAL REVIEW IN GENERAL CASES: INA § 242

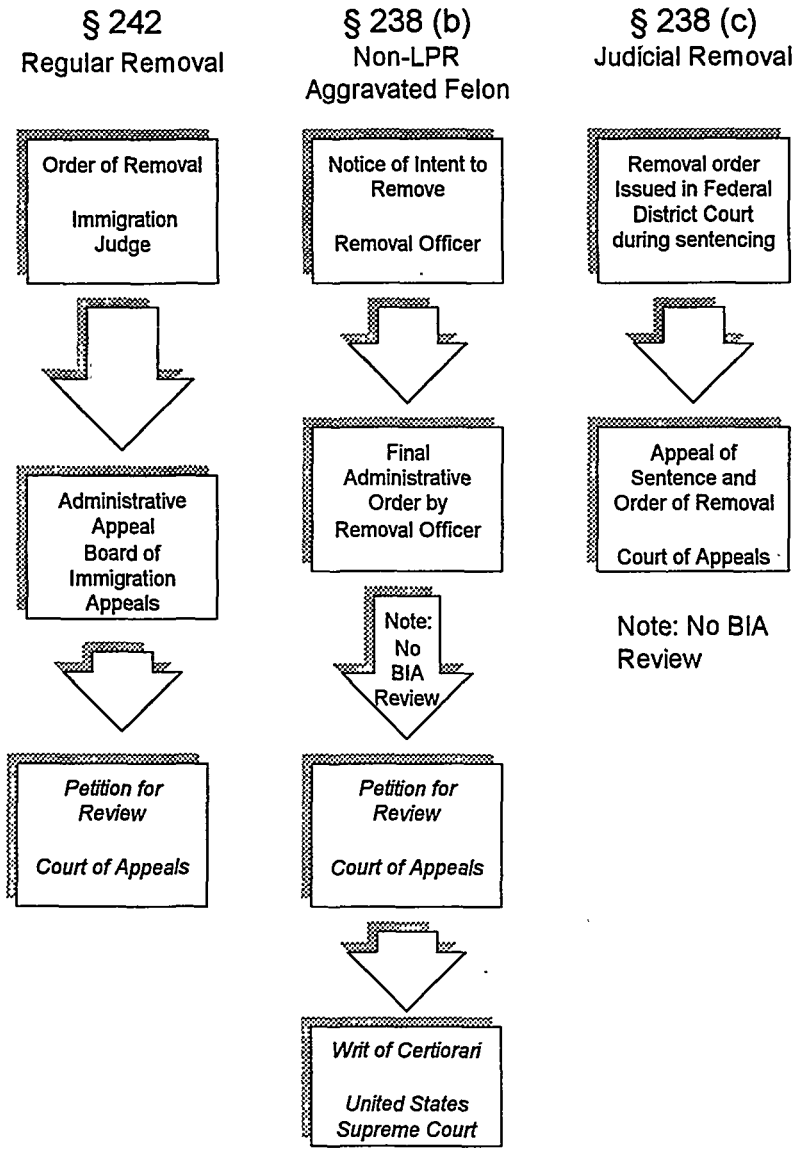
(Not including claims of U.S. Citizenship)



Notes: One motion to reopen/reconsider may be filed within a limited period. Denial of motions may be reviewed as final orders. No automatic stay of removal, but federal court jurisdiction continues in federal court. Habeas corpus review may still exist when custody requirement is met.

CHART 3

TREATMENT OF "CRIMINALS" UNDER INA § 242, § 238(b) AND § 238 (c)



Note: There are no express provisions for judicial review in either § 242 or § 238(b), however the court of appeals may have jurisdiction to determine removability or membership in the barred class.

CHART 4

INTERPRETIVE ANALYSIS OF JUDICIAL REVIEW FOR CERTAIN "CRIMINAL" NON-CITIZENS

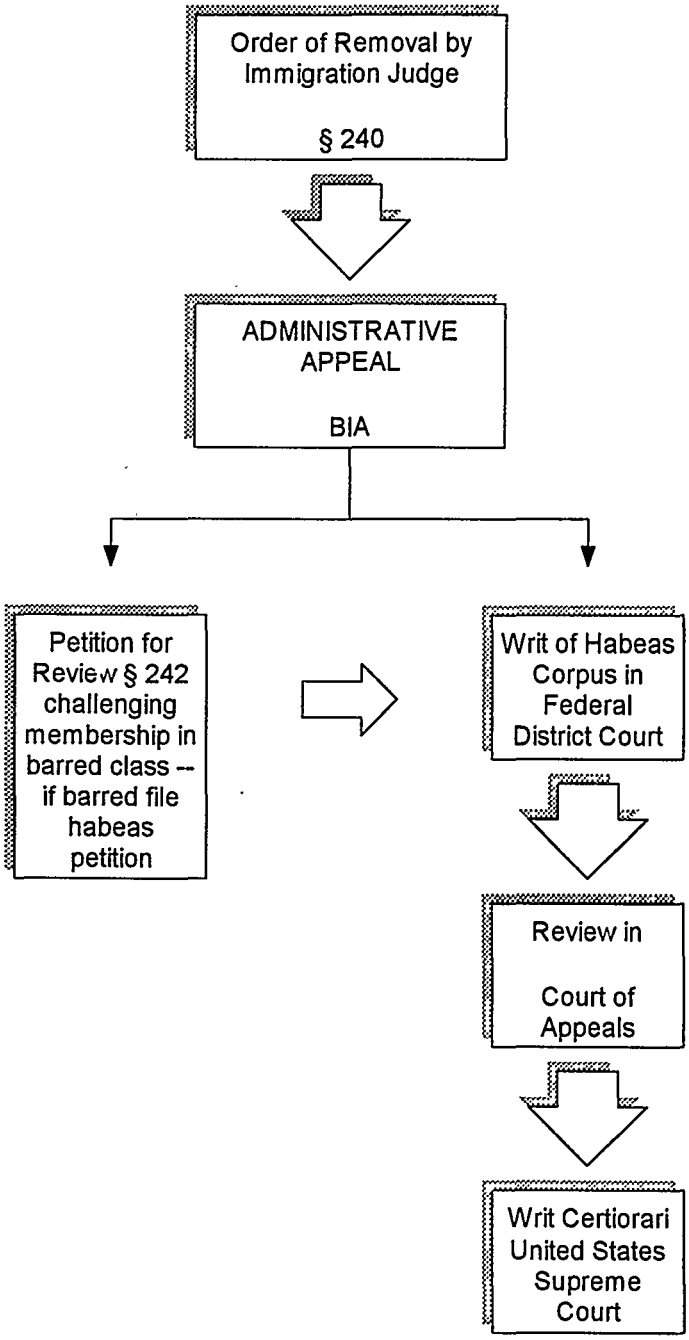


CHART 5

INADMISSIBLE ALIENS AND EXPEDITED REMOVAL, INA § 235(b)(1)